

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT AND JOINT APPENDIX
(Supplemental to Brief For Appellant in No. 16,754)

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,059

JOSEPH R. HYDE,

Appellant,

v.

WALTER N. TOBRINER,
F. J. CLARKE,
JOHN B. DUNCAN,
BOARD OF D. C. COMMISSIONERS,

Appellees.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 4 1963

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STATEMENT OF QUESTIONS PRESENTED

1. & 2. The "Statement of Questions Presented" set forth in the original Brief for Appellant, page (i), is incorporated herein by reference, the same as if it were repeated in full.

3. Whether under T.4-527 of the District of Columbia Code (1951 Edition) Supplement 7, prior to its amendment on October 23, 1962, appellant should have been retired for disability incurred in the line of duty, even assuming arguendo that his disability was not directly proved as being solely attributable to duty, where there was definite evidence at the very least that a condition of uncertain origin was aggravated in the line of duty resulting in appellant's disability to perform his duty.

4. Whether T.4-527(b) of the District of Columbia Code as amended on October 23, 1962, was applicable to appellant's case which has not been finally determined, and he should have been retired for disability incurred in the line of duty.

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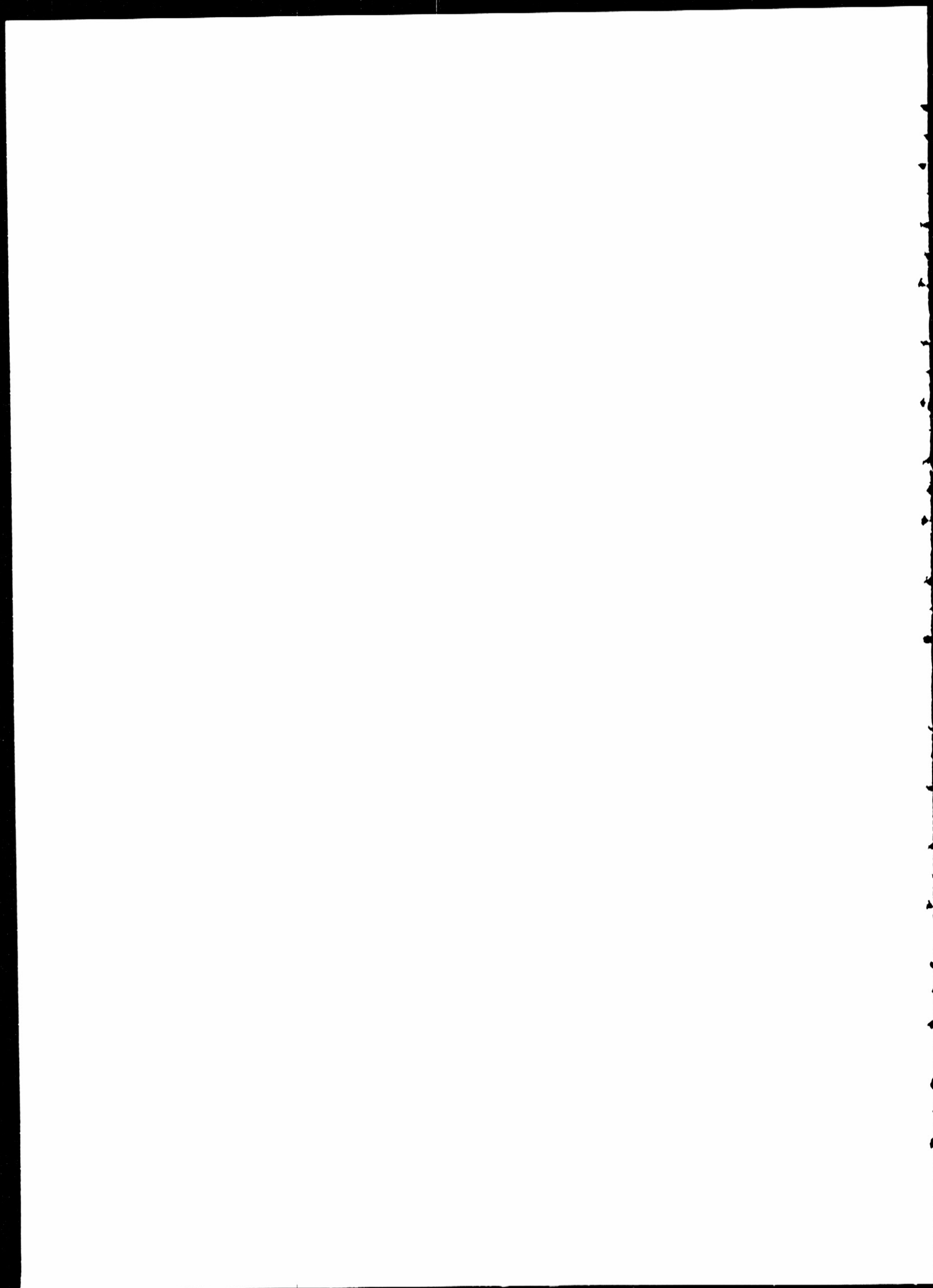
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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,059

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v.

WALTER N. TOBRINER,
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BOARD OF D. C. COMMISSIONERS,

Appellees.

APPEAL FROM A JUDGMENT OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

INTRODUCTORY STATEMENT

This case was previously before this Court as No. 16,754 but the merits of the appeal were not reached or decided, as this Court, by an order dated November 2, 1962 (J.A. 67), ordered the District Court judgment vacated and the case remanded to the Appellee-defendant Commissioners for reconsideration in the light of new legislation (PL 87-857), which became law on October 23, 1962, during the pendency of that appeal, as more fully hereinafter set forth.

After the remand, the Commissioners affirmed their original decision and the District Court re-entered its original judgment in favor of the Appellee-defendants. In accordance with this Court's order granting Appellant's motion for leave to use the original Joint Appendix and Appellant's brief (which have been preserved by the Clerk of this Court on Appellant's request) (it being Appellant's position that the merits of the original appeal and the points raised on the present appeal are now before this Court for a decision) the Joint Appendix on the present appeal will be labeled and referred to as "(Supplemental) Joint Appendix" and will continue on where the original Joint Appendix ended, and commence with page 63. The present brief will be referred to as "(Supplemental) Brief for Appellant" and supplement the original "Brief for Appellant" (filed in No. 16,754), which will, for convenience be referred to as the "(Original) Brief for Appellant."

Thus portions of the "(Original) Brief for Appellant" will be incorporated by reference into the "(Supplemental) Brief for Appellant" in order to avoid unnecessary repetition and printing.

JURISDICTIONAL STATEMENT

This is an appeal from a final order and judgment of the United States District Court for the District of Columbia dated July 10, 1963 denying "Plaintiff's Second Motion for Summary Judgment", and granting the "Motion of Defendants for an Order Re-entering the Order of October 24, 1961, Granting Defendants' Motion for Summary Judgment" (JA 93). This appeal was filed July 10, 1963 (JA 94).

This Court has jurisdiction by virtue of 28 U.S.C. Sections 1291, 1294 and 2106 to review the judgment of the Court below.

The complaint filed in the Court below was for a Mandatory Injunction Directing Retirement of Police Officer for Disability Incurred While Performing Duty and Directing Reversal of the Order Retiring Police Officer for Disability Not Incurred in Performance of Duty (JA 1),

alleging in substance that the Commissioners of the District of Columbia acted arbitrarily and capriciously in affirming the order of the Police and Firemen's Retirement and Relief Board in ordering the retirement of Appellant, a member of the Metropolitan Police Department of the District of Columbia for disability not incurred in the line of duty. Jurisdiction in the Court below is based on Title 11, Section 306 of the D.C. Code, 1951 Edition.

STATEMENT OF THE CASE

A. Facts Prior to Argument of Original Appeal.

The pertinent facts prior to the original appeal are set forth in pages 2-8 of the "(Original) Brief for Appellant" on the original appeal of this case to this Court which is incorporated herein by reference.

B. Court of Appeals Vacated District Court Judgment And Remanded Case to Commissioners.

After the District Court had granted defendant's original Motion for Summary Judgment and denied plaintiff's original Motion for Summary Judgment, plaintiff-appellant appealed to this Court and after argument of case on September 15, 1962, this Court entered an order dated November 2, 1962 (JA 67), which ordered the District Court judgment vacated and the case remanded to the defendant-appellee Commissioners for reconsideration in the light of the new legislation approved October 23, 1962, Public Law 87-857 (JA 68) which dealt with aggravations of injuries as a basis of retirement for disability incurred in the line of duty.

C. District Court Vacated Judgment and Remanded Case to Commissioners.

Thereafter, the District Court, by an order dated December 10, 1962 (JA 63), vacated its prior judgment (which had granted defendants' and denied plaintiff's Motion for Summary Judgment) and remanded the

case to the defendant Commissioners "for reconsideration in accordance with the said . . . order of November 2, 1962" mentioned above and set out at JA 67.

D. Defendant Commissioners Referred Case to Corporation Counsel.

Thereafter the defendant Commissioners referred the matter to the Corporation Counsel for a written opinion, which was rendered on February 25, 1963 (JA 69), a copy of which is attached to the Affidavit of Bernard Margolius as Exhibit 5.

The concluding paragraph of the said opinion of the Corporation Counsel reads as follows:

"I conclude, therefore, that the Act of October 23, 1962 (Public Law 87-857) has only prospective application. It follows that additional testimony is neither necessary nor advisable. The retirement of Joseph R. Hyde was decided by the Commissioners on December 1, 1960 under the then applicable provisions of law relating to his retirement. The Commissioners' reconsideration of the Hyde case in the light of Public Law 87-857, as directed by the Court, is therefore limited to making the determination that the statute is not applicable to this case and that their decision of December 1, 1960 is reaffirmed."

E. Defendant Appellee Commissioners Adopted Corporation Counsel's Opinion.

Thereafter the defendant-appellee Commissioners, by an Order dated February 26, 1963 (JA 73), re-affirmed their original order of November 15, 1960, retiring plaintiff-appellant for disability not incurred in the line of duty and in effect, adopted the aforementioned opinion of the Corporation Counsel, which Commissioners' Order concluded as follows:

"ORDERED: That the action of the Commissioners of the District of Columbia dated November 15, 1960, sustaining the recommendation of the Police and Firemen's Retirement and Relief Board that Private Joseph R. Hyde be retired from the Metropolitan Police force for disability

not incurred in the line of duty, be, and it is hereby, affirmed.

"By order of the Board of Commissioners, D.C."

F. District Court Denied "Plaintiff (Appellant's) Second Motion for Summary Judgment" and Granted Defendant-Appellees' "Motion of Defendant for an Order Re-entering The Order of October 24, 1961 . . ." and Plaintiff Appealed.

Thereafter plaintiff-appellant filed "Plaintiff's Second Motion for Summary Judgment" (JA 63) with pertinent affidavits and exhibits (JA 65-77) including both the original reasons and the "new legislation" as a basis for the granting of said motion. Then appellees filed their "Motion of Defendants for an Order re-entering the order of October 24, 1961 Granting Defendants' Motion for Summary Judgment" (JA 78). Said motions were heard by the District Court (Judge Joseph C. McGarraghy). Plaintiff's motion was denied and defendants' motion granted by an Order dated July 10, 1963 (JA 93), and thereafter plaintiff appealed (JA 94).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are D. C. Code Title 4-526, 4-527, 4-510, and Sec. 9 of Chapter XXXVIII of the Police Manual, all of which are set forth in the aforementioned Brief for Appellant (Original) on pages 9 through 11, which are incorporated herein by reference.

In addition, Public Law 87-857 of the 87th Congress approved October 23, 1962, is reprinted at JA 68.

STATEMENT OF POINTS

1., 2., and 3. "Statement of Points" 1., 2., and 3. as contained in the original Brief of Appellant, pages 11 and 12, are incorporated herein by reference, the same as if here repeated in full.

4. Under the terms of the District of Columbia Code, 1951 Edition, T.4-527, even prior to its amendment on October 23, 1962, on the facts presented, and particularly in view of the liberal interpretation of compensation and retirement laws generally, should have been interpreted as authorizing and requiring appellant's retirement for disability incurred in the line of duty (even assuming *arguendo* he had not proved that this disability was solely and completely attributable to duty and that no condition of uncertain origin was involved), where there was definite evidence that, at the very least, his performance of duty had aggravated a prior condition of uncertain origin or which had not been conclusively connected to his service, and the aggravation of the said prior condition caused his permanent disability to perform his duty.

5. T.4-527(b) of the District of Columbia Code approved October 23, 1962, particularly under the liberal interpretation of compensation and retirement laws generally, is applicable to appellant's retirement for disability which has not yet been finally determined, and requires his retirement for disability incurred in the performance of duty.

SUMMARY OF ARGUMENT

The "Summary of Argument" contained in the original Brief of Appellant, pages 12-13, pertains to Points I, II and III of the Argument and is incorporated herein by reference the same as if here repeated in full.

In addition, there was definite evidence that even, assuming *arguendo* appellant's disability was not proven to be solely and completely attributable to performance of his duty, that at the very least the facts show that his performance of duty had aggravated a prior injury or disease of uncertain origin, and that said prior condition as aggravated had resulted in appellant's disability to perform his duty. While the statute, D. C. Code, T.4-527 prior to amendment, did not expressly provide that such a situation would warrant or require this appellant's

retirement for disability incurred in the line of duty, nevertheless said statute should be so interpreted under the liberal interpretation of compensation and retirement laws generally, and the said law as amended on October 23, 1962 merely clarifies its previous meaning to that effect.

Also, T.4-527(b) as approved on October 23, 1962, authorizing retirement for disability incurred in the line of duty where the cause of a disease or injury is doubtful, or is shown to be other than from the performance of duty, and such disease or injury has been aggravated by the performance of duty so as to cause permanent disability to perform duty, the disability shall be construed as having been incurred in the performance of duty, is applicable to the present case and requires appellant's retirement for disability incurred in the line of duty because, among other reasons, this Court at least impliedly so ruled, and also it is applicable to retirement cases, including this one, which have not yet been finally determined.

ARGUMENT

Points I, II and III set forth in the (original) Brief for Appellant, pages 13-20, are incorporated herein by reference, the same as if here repeated in full.

IV

Appellant Was Entitled to Be Retired for Disability Incurred In The Line of Duty on the Basis of "Aggravation" Under Title 4-527 Even Prior to the Enactment of the New Law (Public Law 87-857) Because Under the Said Title 4-527 and Compensation Law Generally, an "Aggravation" of a Prior Condition Is the Equivalent of an Original Injury.

Prior to the enactment of the new legislation, Title 4-527 of the retirement law provided, in part, that:

"Whenever any member is injured or contracts a disease in the performance of duty or such injury or disease is aggravated by such duty at any time after appointment, and such injury or disease or aggravation permanently disables him

for the performance of duty he shall be retired at the greater disability rate." (emphasis supplied)

From this language, there appears to be some contradiction in terms since the word "such" seems to refer to injuries incurred in the performance of duty, which would make the words "at any time after appointment" unnecessary, since no one could be injured in the performance of duty until he was in fact appointed.

Because of the last quoted words in the old law, it has been consistently urged by appellant's counsel that an aggravation in line of duty should be treated as equivalent to an injury in line of duty. Thus, the new legislation in effect does nothing more than clarify the old law in establishing the standard of proof for the Commissioners to determine whether a police officer has been disabled in the performance of duty. This argument was advanced in this Court in the prior appeal of this case, in the case of Souder v. Tobriner, et al, ___ App. D.C. ___, 314 F.2d 272, and in the case of Lovell v. Tobriner, ___ U.S. App. D.C. ___, 310 F.2d 870.

In the absence of a statute to the contrary, it is well settled law that one is deemed to be injured as the result of an accident for which he can recover damages or in the case of an employee, receive workmen's compensation, to the full extent of the disabilities arising from such accident, even though the injuries may have been aggravated by reason of a pre-existing physical condition, or by reason of a latent disease, rendering the injuries more serious than they would have been had the person been in robust health. Where the result of an accident or of employment is to bring into activity a dormant or incipient disease, or one to which the injured person is predisposed, such accident or employment is in fact the cause of the resultant disability. Thus, for example, if a latent condition itself does not cause pain or suffering but said condition plus an injury does cause such pain, the injury, and not the latent condition, is, in law, the cause of the pain. This has been frequently applied in workmen's compensation cases, as well as in damage suits.

Acceleration or aggravation of a pre-existing disease is in law an injury in the occupation causing such acceleration. Thus, in the case of Bradley v. City of Los Angeles, 55 Cal. App. 2nd 592, 131 P.2d 391, the petitioner (widow) contended that by reason of and as a direct result of a dog bite and Pasteur treatments in June 1933, her husband, a member of the police department, had died as a result of an injury received during the performance of his duty and that, therefore, she was entitled to a pension of \$100 a month. Her husband had jumped or fallen to the ground when he opened a screen of a window in his room. The city claimed on the contrary that the petitioner's husband had died as a result of a disease denominated as cirrhosis of the liver which was not connected with his duty. The court stated in pertinent part as follows (emphasis supplied):

"The policy of this state is to construe provisions of the character involved liberally, serving as they do a beneficial purpose. The word injury as used in the charter hereinabove quoted is not limited in its interpretation to injuries caused by external violence, physical force, or as a result of accident in the sense that the word is commonly used and understood but it is given a much broader and liberal meaning. So construed, it includes any injury or disease arising out of and in the course of the employment which causes the incapacity or death. The word injury has reference not to some break in some part of the body or some wound thereon or the like, but rather to consequences or disability that result therefrom. Courts are practically unanimous in holding that the word should be given a broad and liberal construction in order that the humane purpose of the enactment may be realized. Such legislation should be applied fairly and broadly with a view to confer the benefits intended. Acceleration or aggravation of a pre-existing disease is an injury in the occupation causing such acceleration . . .

"It is the hazard of the employment acting upon the particular employee in his condition of health, and not what that hazard would be if acting on a healthy employee. . . . Whatever predisposing physical condition may exist, if the employment is the immediate occasion of the injury, it arises out of the employment, because it develops within it."

The Court in the aforementioned case concluded that the dog bite which had arisen within the course of his employment had accelerated and by continual unbroken process precipitated his death (by falling or

jumping out of the window) and held that the widow was entitled to her pension.

In the case of Buckley v. Roche, 214 Cal. 241, 4 P.2d 929, quoted in the afreomentioned case, it was held that the fact that a police officer was suffering from a previous heart affliction would not deny his widow a pension if exertion in climbing a stairway precipitated death by aggravating this condition.

Under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. 902(2), applicable to Workmen's Compensation cases in the District of Columbia, the word "injury" is defined, but the definition makes no mention of the word "aggravation". The aforementioned section reads as follows:

"The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of this employment."

Despite the absence of any mention of "aggravation" as being included it has been quite consistently held by this Court that an act which is done by an employee in the course of his work ordinary and usual in character which aggravates a pre-existing condition is compensable, i.e., is an injury within the meaning of the act.

Thus, an aggravation by effect of the cold in going into freezing rooms of an ice cream plant causing contraction of blood vessels and affecting a pre-existing condition of arterio-sclerosis in the leg so as to result in gangrene and subsequent amputation of the leg was held compensable in Hoage v. Employers Liability Corp., 62 U.S. App. D.C. 77, 64 F.2d 715.

In London Guarantee & Acc. Co. v. Hoage, 63 U.S. App. D.C. 323, 72 F.2d 191, it was held that an aggravation of a heart condition by heat from ovens effecting failure of weak heart and causing death was compensable.

In Commercial Casualty Ins. Co. v. Hoage, 64 U.S. App. D.C. 158, 75 F.2d 677, an injury superimposed upon a diabetic condition resulting in four amputations and death was held compensable.

In Robinson v. Bradshaw, 92 U.S. App. D.C. 216, 206 F.2d 435, cert. denied, 346 U.S. 899, 74 S.Ct. 226, it was held that if an illness which is itself unrelated to the employment is nevertheless aggravated thereby and death results, then the death is the result of an injury within the meaning of the section quoted above.

In the case of Friend v. Britton, 95 U.S. App. D.C. 139, 220 F.2d 820, cert. denied, 350 U.S. 836, 76 S.Ct. 72, it was held that an aggravation of a pre-existing aneurysm of abdominal aorta caused by unexpected overexertion constituted "accidental injury" within the meaning of the above quoted section.

Further, on the subject of liberal construction of pension and retirement laws see 2 Municipal Corporations, Yokley, para. 357, p. 203, under the heading of "Pensions, rights and restrictions thereon", where it is stated:

"(a) Liberal construction of pension laws. -- The courts are in general agreement that pension statutes are to be liberally construed (citing cases). This liberal construction is in favor of the pensioner. (citing cases). It has also been stated that pension statutes are to be liberally construed with the view to the protection of the pensioner and his family. (citing cases). Pension laws must be liberally construed to achieve their beneficent purposes" (citing cases).

As further indication that an "aggravation" or "acceleration" is equivalent to an "injury" under the pension laws, see 3 McQuillin, Municipal Corporations, para. 12.149, p. 531 where it is stated (under heading of "Right to Pension-Disability"):

"Although recovery may not be had for incapacity due to disease which did not result from claimant's public service, or for incapacity resulting from a disease contracted prior to entry into municipal service, acceleration or aggravation of a pre-existing disease is an injury for which

a pension is payable." (citing Bradley v. City of Los Angeles, 131 P.2d 361) (emphasis supplied)

This Court has apparently never interpreted the retirement law in relation to cases of disability resulting from an aggravation of a pre-existing condition. The cases coming before the Court, as noted above, were referred back to the Commissioners for reconsideration in light of the new legislation. This Court has stated in Crawford v. McLaughlin, 109 U.S. App. D.C. 264, 286 F.2d 821, however, that the provisions of the Retirement Act must be given a liberal and broad construction so that the humane purpose of the retirement law may be realized. It is certainly not in keeping with this purpose to deny a man the disability benefits in a case where he is seriously and permanently disabled from all work as a result of a condition arising out of his performance of police duties on the ground that but for a pre-existing condition or a latent disease, he would not have been disabled. Carrying this to the ridiculous extreme, it could be argued that a police officer who sustains a fractured leg in line of duty should be denied disability benefits for the injuries incurred in performance of duty because his bones were too brittle and, therefore, were predisposed to fractures. Certainly no one would advance such an argument and yet this, to a varying degree, must be the argument to deny a person full disability benefits in cases of aggravation or acceleration.

There is certainly ample basis for finding an "aggravation" in the instant case (which plaintiff contends is really not necessary as pointed out in Point I above). Thus, as outlined in pertinent portions of the transcript of the hearing before the Retirement Board (JA 16-18, 20-21, and original Brief for Appellant pp. 5-6) plaintiff indicated that in cranking a motorcycle, the strain was on the knee, that when it backfired, "if you are sitting on the seat, it will lift you off", and that "in a normal trick of duty", he would "crank" the motorcycle maybe 30 or 40 times. The record also indicates that plaintiff served as a motorcycle policeman for approximately 15 of the 17 years he was in the Police Department.

It is therefore urged, that even prior to the enactment of Public Law 87-857 on October 23, 1962, Title 4-527 should have been interpreted and construed as encompassing cases of "aggravation", such as the instant case.

V

Public Law 87-857 Approved October 23, 1962 Is
Applicable to the Present Case, in Any Event.

This Court in another case which was brought before it and which presented a matter of aggravation has referred the case back to the Commissioners for consideration in the light of the new legislation, if found to be applicable. Thus see the case of Lovell v. Tobriner, ___ U.S. App. D.C. ___, 310 F.2d 870, which opinion concluded "New legislation (referring to Public Law 87-857) recently enacted should also be considered if found applicable."

It is contended that this Court by using the phrase "if found applicable" meant if the facts were such as to fall under said statute and not whether the statute was in effect and pertinent to a consideration of the case, i.e., a question of fact not a question of law.

In this connection, it is extremely doubtful that this Court would sidestep the issue presented on the original appeal and refrain from deciding the case on its merits and remand it for a mere determination by the Commissioners as to whether or not the statute should be considered as effective and pertinent to the facts in the case. This is particularly so because this Court had the pertinent parts of plaintiff's record before it including the order of the Police and Firemen's Retirement and Relief Board dated April 26, 1960 (JA 35) and also defendants' letter to the plaintiff dated December 1, 1960 (JA 58) which indicated that the defendants had voted to sustain the action of the Retirement Board retiring the plaintiff for disability not incurred in the line of duty. It is not normally the function of an Appellate Court to make factual finding and thus it is

submitted, that in the instant case and in the Lovell case, the remand was to give the appellees the opportunity to make a factual finding as to whether there was any "aggravation" under the new act, which there in fact was, as herein above shown.

The Statute, even assuming arguendo that it is not retroactive, would still be applicable at least to any case which had not yet been finally determined, including the instant case in which the plaintiff is still litigating the type of retirement to which he is entitled. Thus, it is submitted that the Corporation Counsel, in his memorandum (JA 69), missed the point involved when he concluded that the statute was not retroactive. The Court of Appeals did not at any time indicate that the question was whether or not the statute was retroactive.

In addition, the legislative history of the said Act referred to in the Corporation Counsel's opinion (JA 75), the House of Representatives Report No. 892, states in pertinent part as follows:

"The purpose of this legislation is to . . . and place the burden of proof on the government that such duty did not aggravate the injury or disease . . ."

The case of Graham v. Tebriner, et al, Civil Action No. 1291-62 in the District Court is pertinent to the present injury and a copy of the memorandum opinion of Judge Tamm, dated June 28, 1962 is attached to the affidavit of Bernard Margolius (JA 77). In that case, the plaintiff, a motorcycle policeman, was retired for gout found by the Retirement Board and Commissioners not to have been incurred in the line of duty. Judge Tamm reversed the Commissioners, stating in part:

"The Court is of the opinion that the entire record in this case overwhelmingly favors the position of the plaintiff. In addition to the medical testimony, the records of the Police Department and Police Department Clinic disclose the plaintiff's ailment was consistently recognized as having been incurred in the line of duty. In spite of the testimony of Dr. Darrell C. Crain that gout is 'believed to be a hereditary metabolic disease' there is nothing in the record to indicate that plaintiff's

affliction was not the result of the trauma resulting from the constant cranking of his motorcycle. Therefore, the action of the defendant sustaining the decision of the Police and Firemen's Retirement Relief Board is arbitrary and unsupported by the evidence before the Board and before the defendants. In evaluating the evidence comprising the record in this case, the Court is required by the Court of Appeals decision in the case of Crawford v. McLaughlin, et al, 109 U.S. App. D.C. 264 to consider this evidence in the light of the 'humane purpose of such retirement laws'." (emphasis supplied)

Thus the effect of the Graham case was to hold that the employment and not the predisposing physical condition or disease was the immediate cause of the disabling condition and consequently the officer was entitled to retirement for disability incurred in the performance of duty. The Graham case is also pertinent to Point IV above. Also, the Souder case supra, which involved a disabling neurosis "following a severe attack of bulbar polio", the origin of which was doubtful might be regarded as an aggravation of a prior condition of doubtful origin.

In 5 Am.Jur.2nd 389, Appeal and Error, para. 962, paragraph headed "Remand for Further Proceedings-in-General", it is stated, in part:

"... Even where the record discloses error which would have justified entry of judgment by the Appellate Court, the Court may have discretionary power to remand for further proceedings in order to prevent the failure of justice."

It is submitted that the foregoing quotation may well be applicable to the instant case and that this Court remanded the case to the Commissioners to give them an opportunity to correct their error, which, however, they have failed to do, and which should now be corrected by this Court.

CONCLUSION

Here, the appellant contends as shown by Points I, II and III above, that the evidence is clear that he was disabled in the line of duty. It is even clearer, however, that the evidence supports the contention that his long service as a motorcycle policeman in "cranking" his motorcycle maybe 30 or 40 times a day on duty over a period of 15 years aggravated and brought on the disabling condition of arthritis in his leg, even assuming arguendo the origin of the arthritis was doubtful. In addition, it is submitted that the new law applies to this case and that the record clearly supports and requires a finding that appellant's disability was incurred in the line of duty and that he should be retired for disability incurred in the line of duty.

Respectfully submitted,

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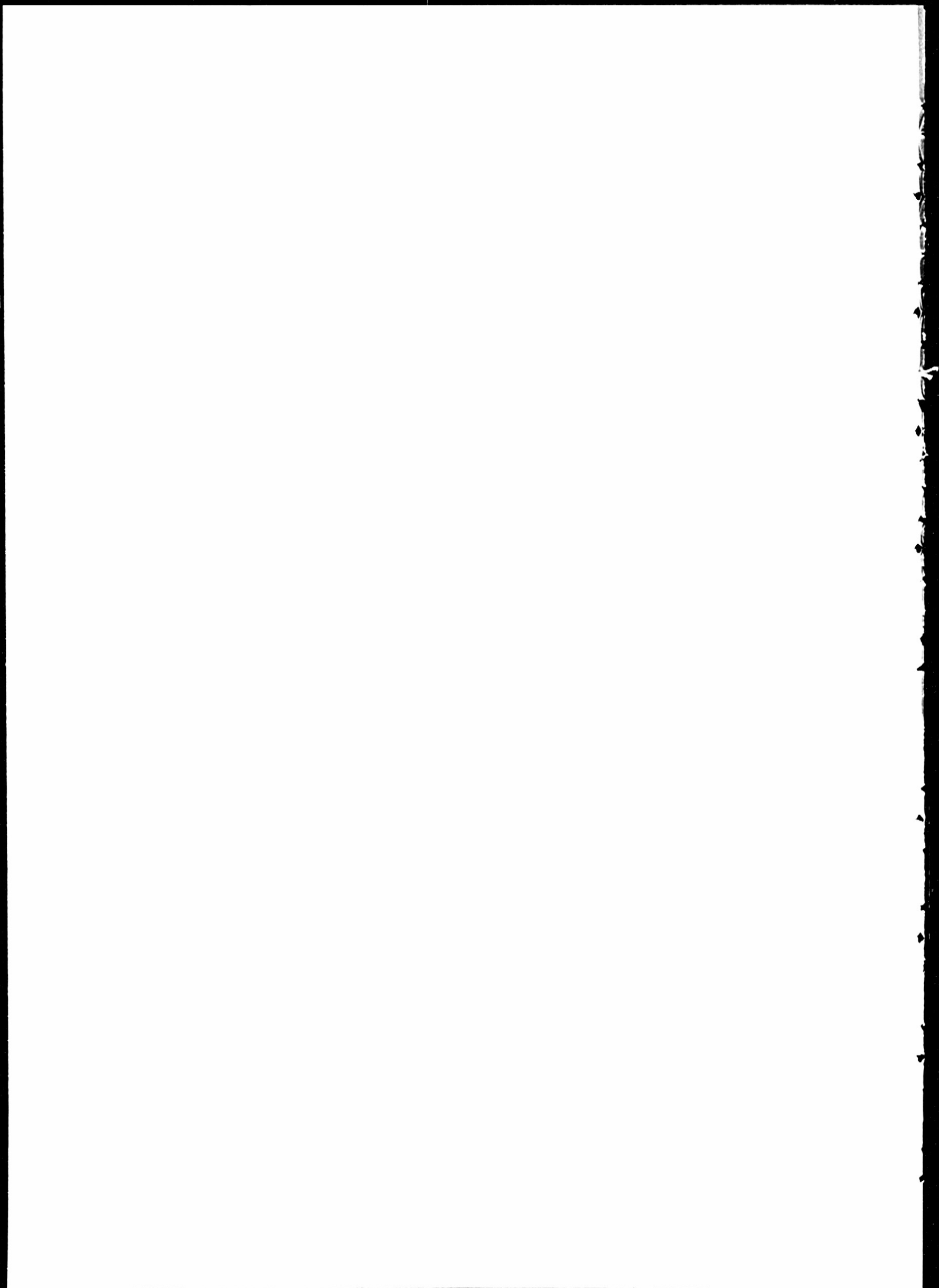
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(i)

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JOINT APPENDIX (SUPPLEMENTAL)

[Filed November 27, 1962]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOSEPH R. HYDE,

Plaintiff

vs.

C.A. No. 4076-60

WALTER N. TOBRINER, et al
Individual Members of the Board
of Commissioners, District of
Columbia

Defendants

ORDER

Upon consideration of the Order of the United States Court of Appeals entered November 2, 1962 upon the appeal of this case to said Court, it is this 10th day of December, 1962,

ORDERED, that the judgment of this Court heretofore entered in this case be and the same hereby is, vacated, and it is

FURTHER ORDERED, that this case be, and the same hereby is, remanded to the Commissioners of the District of Columbia for reconsideration in accordance with said United States Court of Appeals Order of November 2, 1962.

/s/ Joseph C. McGarraghy
Judge

[Certificate of Service]

[Filed May 17, 1963]

PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT

The plaintiff moves the court to enter summary judgment in his favor on the ground that consideration of the pleadings and other matter on file demonstrates that there is no genuine issue as to any material

fact and that the plaintiff is entitled to judgment as a matter of law.

The plaintiff asks that the verified complaint filed herein and that the exhibits attached to the prior Motion for Summary Judgment filed herein, A through G, and plaintiff's Exhibits 1, 2 and 3 attached to his "Supplement to Motion for Summary Judgment" filed herein on or about October 17, 1961, and Exhibits 4-A, B, C and D, and 5 through 8 attached to the affidavit of Bernard Margolius, filed herein, all be incorporated herein by reference and made a part of this Motion, and that the court consider the same on the hearing of this Motion.

/s/ Bernard Margolius

/s/ Carleton U. Edwards, II
Attorneys for Plaintiff
1000 Vermont Avenue, N. W.
Washington, D. C.

I hereby certify that a copy of the foregoing Plaintiff's Second Motion for Summary Judgment was served by hand this ____ day of May, 1963 on William F. Patten, Assistant Corporation Counsel, attorney for defendants, Washington, D. C.

Carleton U. Edwards, II

[Filed May 17, 1963]

STATEMENT OF MATERIAL FACTS AS TO WHICH
PLAINTIFF CONTENDS THERE IS NO GENUINE ISSUE

Plaintiff incorporates herein by reference the same as if here repeated the pleading heretofore filed on September 1, 1961 in this action entitled "Statement of Material Facts As to Which Plaintiff Contends There is no Genuine Issue", with the addition thereto of a document entitled "Government of the District of Columbia Board of Police and Fire Surgeons, Washington, D. C. Personnel Papers", July 7, 1959, Case No. 17-4280/A - Treatment of Injury or Disease Incurred in the Performance of Duty, which was attached to plaintiff's original Motion for Summary Judgment as plaintiff's Exhibit No. 1, and as set forth in Exhibit 4-B

attached to the affidavit of Bernard Margolius filed herein, which document indicates that the plaintiff, Joseph R. Hyde, incurred arthritis in the performance of his duty and received outside treatment or services therefor, which document was signed by members of the Board of Police and Fire Surgeons.

/s/ Bernard Margolius

/s/ Carleton U. Edwards, II
Attorneys for Plaintiff

I hereby certify that a copy of the foregoing Statement of Material Facts . . . was delivered by hand this 17th day of May, 1963 to William F. Patten, Ass't. Corp. Counsel, attorney for defendants, Washington, D. C.

Carleton U. Edwards, II

[Filed May 17, 1963]

AFFIDAVIT OF BERNARD MARGOLIUS

Bernard Margolius, being first duly sworn on oath deposes and says as follows:

1. I am one of the attorneys for the plaintiff in the above entitled case.

2. I have attached to this Affidavit the following exhibits all of which are true copies or the originals of what they purport to represent, and which are requested to be considered in connection with Plaintiff's Second Motion for Summary Judgment:

Exhibit 4-A - A copy of the "Brief for Appellant" in the case of Joseph R. Hyde, Appellant vs. Walter N. Tobriner, et al, No. 16754 in the U. S. Court of Appeals for the District of Columbia Circuit

Exhibit 4-B - A copy of the "Joint Appendix" filed in the case mentioned in 4-A above.

- Exhibit 4-C - A copy of the Order of the U. S. Court of Appeals, D. C. in the case of Joseph R. Hyde vs. Walter N. Tobriner, et al, dated November 2, 1962.
- Exhibit 4-D - A copy of Public Law 87-857 87th Congress, H. R. 6836, approved October 23, 1962, "To Amend Police and Firemen's Disability Act."
- Exhibit 5 - A copy of an opinion of the Corporation Counsel, District of Columbia, dated February 25, 1963 and addressed to the Commissioners of the District of Columbia, a copy of which was forwarded to me, attached to Exhibit 6 mentioned below.
- Exhibit 6 - A copy of an Order of the Board of Commissioners of the District of Columbia dated February 26, 1963 entitled 'Subject: U. S. Court of Appeals No. 16754, Office of the Corporation Counsel'.
- Exhibit 7 - A copy of House of Representatives report No. 892, 87th Congress, First Session entitled "Amending the Police and Firemen's Retirement and Disability Act", which was obtained by my office from the Senate document room.
- Exhibit 8 - A copy of a "Memorandum Opinion" of Judge Edward A. Tamm of this Court in the case of William R. Graham, Jr. vs. Walter N. Tobriner, et al, C. A. No. 1291-62.

/s/ Bernard Margolius

[JURAT dated May 17, 1963]

[Certificate of Service]

[Filed November 2, 1962]

PLAINTIFF'S EXHIBIT 4 "C"

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 16,754

September Term, 1962

Joseph R. Hyde,

Appellant,

v.

Walter N. Tobriner, et al.,
Individual Members of the Board of
Commissioners, District of Columbia,

Appellees

Before: Edgerton, Fahy and Burger, Circuit Judges,
in Chambers.

Appeal from the United States District Court for the District of Columbia.

ORDER

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

It appears that subsequent to the argument of this case on September 18, 1962, the Congress of the United States enacted, and the President approved on October 23, 1962, Public Law 87-857, an Act amending the Policemen and Firemen's Retirement and Disability Act.

ON CONSIDERATION WHEREOF, it is ORDERED by the court that the judgment of the District Court on appeal herein is vacated and the case is hereby remanded to the District Court with directions to remand the case to the Commissioners of the District of Columbia for reconsideration in the light of the above-mentioned legislation, with opportunity to the parties, if so advised, to adduce additional evidence.

It is further ORDERED by the court that each party shall bear his own costs on this appeal.

Per Curiam.

Dated: November 2, 1962

PLAINTIFF'S EXHIBIT 4 "D"

Public Law 87-857
87th Congress, H.R. 6836
October 23, 1962

AN ACT

76 STAT. 1133.

To amend the Policemen and Firemen's Retirement and
Disability Act.

Be it enacted by the Senate and House of Representatives
of the United States of America in Congress assembled, That
the Policemen and Firemen's Retirement and Disability Act,
as amended by the Act approved August 21, 1957 (71 Stat. 394),
is amended by designating subsection (g) as subsection (g)(1)
and by inserting the following paragraph at the end of such
subsection:

D. C. policemen
and firemen.
Disability re-
tirement.
D. C. Code
4-527.

"(2) In any case in which the proximate cause of an injury
incurred or disease contracted by a member is doubtful, or is
shown to be other than the performance of duty, and such injury or
disease is shown to have been aggravated by the performance of duty
to such an extent that the member is permanently disabled for the
performance of duty, such disability shall be construed to have been
incurred in the performance of duty. The member shall, upon
retirement for such disability, receive an annuity computed at the
rate of 2 per centum of his basic salary at the time of his retire-
ment for each year or portion thereof of his service: Provided,
That such annuity shall not exceed 70 per centum of his basic salary
at the time of retirement, nor shall it be less than 66 2/3 per centum
of his basic salary at the time of retirement."

Approved October 23, 1962.

PLAINTIFF'S EXHIBIT 5

* * *

February 25, 1963

IN RE: Reconsideration by the Commissioners of the retirement of
Joseph R. Hyde in the light of Public Law 87-857. (CCO:
3.P6.3 - Hyde, Joseph R.)

COMMISSIONERS OF THE DISTRICT OF COLUMBIA

Gentlemen:

You referred to me for opinion the retirement case of Joseph R. Hyde, a former member of the Metropolitan Police Department. The chronology of events in the Hyde case is as follows:

Mr. Hyde was appointed a policeman on June 16, 1943. In October, 1959 he was certified by a member of the Board of Police and Fire Surgeons to be unable to further perform his duties as a policeman. The Police and Firemen's Retirement and Relief Board, after hearings, retired Officer Hyde, effective from and after April 30, 1960, for disability not incurred in the line of duty. The Board of Commissioners, after a hearing, by order dated December 1, 1960 sustained the action of the Board. Mr. Hyde appealed the Commissioners' decision to the United States District Court for the District of Columbia. The District Court, in October, 1961, granted the Commissioners' motion for summary judgment. However, on appeal to the United States Court of Appeals for the District of Columbia Circuit, the Court, on November 2, 1962, stated as follows:

"It appears that subsequent to the argument of this case on September 18, 1962, the Congress of the United States enacted, and the President approved on October 23, 1962, Public Law 87-857, and Act amending the Policemen and Firemen's Retirement and Disability Act.

"ON CONSIDERATION WHEREOF, it is ORDERED by the court that the judgment of the District Court on appeal herein is vacated and the case is hereby remanded to the District Court with directions to remand the case to

the Commissioners of the District of Columbia for reconsideration in the light of the above-mentioned legislation, with opportunity to the parties, if so advised, to adduce additional evidence."

As ordered, the case was remanded by the District Court to the Commissioners by Order dated November 23, 1962. The Board of Commissioners has referred to this office for a determination the question of the scope of the reconsideration which they are required to give the case pursuant to the court order.

The question presented therefore is: What consideration, if any, must the Commissioners give to their decision relating to the retirement of Mr. Hyde in the light of Public Law 87-857? This statute provides:

"... That the Policemen and Firemen's Retirement and Disability Act, as amended by the Act approved August 21, 1957 (71 Stat. 394), is amended by designating subsection (g) as subsection (g)(1) and by inserting the following paragraph at the end of such subsection:

"(2) In any case in which the proximate cause of an injury incurred or disease contracted by a member is doubtful, or is shown to be other than the performance of duty, and such injury or disease is shown to have been aggravated by the performance of duty to such an extent that the member is permanently disabled for the performance of duty, such disability shall be construed to have been incurred in the performance of duty. The member shall, upon retirement for such disability, receive an annuity computed at the rate of 2 per centum of his basic salary at the time of his retirement for each year or portion thereof of his service: Provided, That such annuity shall not exceed 70 per centum of his basic salary at the time of retirement, nor shall it be less than 66-2/3 per centum of his basic salary at the time of retirement."

Subsection (g)(1) of the Policemen and Firemen's Retirement and Disability Act, as so redesignated by Public Law 87-857 (§ 4-527, D. C. Code, 1961 edition), provides that:

"(g)(1) Whenever any member is injured or contracts a disease in the performance of duty or such injury or disease is aggravated by such duty at any time after appointment and such injury or disease or aggravation permanently disables him for the performance of duty, he shall upon retirement for such disability, receive an annuity computed at the rate of 2 per centum of his basic salary at the time of retirement for each year or portion thereof of his service: Provided, That such annuity shall not exceed 70 per centum of his basic salary at the time of retirement, nor shall it be less than 66-2/3 per centum of his basic salary at the time of retirement."

The effect of subsection (g)(2) of the Retirement Act, as added by Public Law 87-857, is to dispense with the necessity for determining, in order to retire a member for line-of-duty disability, that an injury was incurred or a disease was contracted in the performance of duty in cases where an injury or disease was aggravated by the performance of duty. It is therefore a liberalizing amendment, making available retirement annuities computed at the higher annuity rate for retirement due to disability incurred in the performance of duty to some who otherwise would be retired for disability not incurred in the performance of duty.

As above set forth, Public Law 87-857 was approved October 23, 1962. Although the prior amendments to the retirement Act, the Policemen and Firemen's Retirement and Disability Act Amendments of 1957, approved August 21, 1957 (71 Stat. 391; §§ 4-521 to 4-538, D. C. Code, 1961 edition), were specifically made effective retroactively to October 1, 1956, there is no provision in the latest amendment for a retroactive effective date.

As is stated in D. C. Transit System v. Pearson, 149 F. Supp. 18 (1957), "... It is a well established and well recognized principle of statutory construction that in case of any ambiguity or doubt, a statute will be given a prospective rather than a retroactive effect." (Cases cited.) Sutherland, Statutory Construction, 3rd Edition, in discussing

retroactivity in section 2201, states: ". . . Retrospective operation is not favored by the courts, however, and a law will not be construed as retroactive unless the act clearly, by express language or necessary implication, indicates that the legislature intended a retroactive application . . ."

A review of the legislative history of H. R. 6836, 87th Congress, the bill which became Public Law 87-857, shows no indication of a Congressional intent that the Act be retroactive. To the contrary, the wording in the Senate report on the bill, Report No. 2271, Oct. 3, 1962, comports entirely with prospective application. The report states, in pertinent part as follows:

"The purpose of this bill is to amend existing law so as to create an additional category of service-connected disability which will enable policemen and firemen to retire if an injury or disease contracted other than exclusively in the performance of duty is so aggravated by the performance of duty as to disable the member from further duty.

"A member retiring under this proposed legislation will receive the same annuity as if there was no doubt of the disability having resulted exclusively in the performance of duty. Such legislation is comparable to and in keeping with industrial compensation procedures.

"The Fiscal Affairs Subcommittee of this committee held a hearing on H. R. 6836 on August 1, 1962, and received favorable testimony from representatives of the Board of Commissioners of the District of Columbia, the Fire Department, and the Police Department, as well as representatives of the Firemen's Association, and the Policemen's Association. At this time the subcommittee was informed that during the calendar years 1958, 1959, and 1960, the Policemen and Firemen's Retirement and Relief Board cleared 379 retirement cases, of which 292 were retirements for disability incurred in performance of duty, 23 were retirements for disability incurred not in the performance of duty, and 64 were optional retirements for age and service. Based on the experience over the preceding 3 years,

it is anticipated that the future costs of this legislation will be minor." (Emphasis supplied.)

The House Report (No. 892, Aug. 10, 1961) is to the same effect.

In addition to the couching of the reports in terms of future application of the bill, it is noted that although the number of retirements in 1958, 1959 and 1960 for disability incurred not in the performance of duty were mentioned in the reports, there was no indication that the additional category of service-connected disability should be made applicable to them.

I conclude, therefore, that the Act of October 23, 1962 (Public Law 87-857) has only prospective application. It follows that additional testimony is neither necessary nor advisable. The retirement of Joseph R. Hyde was decided by the Commissioners on December 1, 1960 under the then applicable provisions of law relating to his retirement. The Commissioners' reconsideration of the Hyde case in the light of Public Law 87-857, as directed by the Court, is therefore limited to making the determination that the statute is not applicable to this case and that their decision of December 1, 1960 is reaffirmed.

Respectfully submitted,

CHESTER H. GRAY
Corporation Counsel, D. C.

PLAINTIFF'S EXHIBIT 6

Order No. 63-579

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE
WASHINGTON 4, D.C.

February 26, 1963

* * * *

SUBJECT: U. S. COURT OF APPEALS No. 16,754
Office of the Corporation Counsel

WHEREAS, by order dated November 2, 1962, the United States Court of Appeals for the District of Columbia Circuit directed that the

case of Hyde v. Tobriner, et al., United States Court of Appeals numbered 16,754, be remanded to the United States District Court for the District of Columbia, and by the latter to the Commissioners of the District of Columbia for their reconsideration in the light of Public Law 87-857, an Act amending the Policemen and Firemen's Retirement and Disability Act, with opportunity to the parties, if so advised, to adduce additional evidence;

AND WHEREAS, pursuant to the directive of the United States Court of Appeals, the United States District Court for the District of Columbia, by order dated December 10, 1962, remanded the case to the Commissioners;

AND WHEREAS, the Commissioners, after having conferred with counsel for both parties and still being uncertain of the legal aspects of the case, referred the matter to the Corporation Counsel of the District of Columbia for a written opinion as to the applicability of the aforementioned amendment to the Policemen and Firemen's Retirement and Disability Act and the necessity of adducing additional testimony;

AND WHEREAS, in an opinion dated February 25, 1963, copy of which is hereto annexed and made a part hereof by reference, the Corporation Counsel concluded that, because it has no retroactive application, Public Law 87-857 is not applicable to said case, and that, accordingly, no further testimony is necessary;

AND WHEREAS, the Commissioners, having considered carefully the Order of the Court of Appeals, the Order of the District Court, the views expressed by the attorney for Private Hyde, and the attached opinion of the Corporation Counsel, it is this 26th day of February, 1963,

ORDERED: That the action of the Commissioners of the District of Columbia dated November 15, 1960, sustaining the recommendation of the Police and Firemen's Retirement and Relief Board that Private Joseph R. Hyde be retired from the Metropolitan Police force for disability not incurred in the line of duty, be, and it is hereby, affirmed.

By order of the Board of Commissioners, D. C.

Acting Secretary to the Board

PLAINTIFF'S EXHIBIT 7

87TH CONGRESS)
1ST SESSION)

HOUSE OF REPRESENTATIVES

(REPORT
(NO. 892

AMENDING THE POLICEMEN AND FIREMEN'S
RETIREMENT AND DISABILITY ACT

AUGUST 10, 1961. —Committed to the Committee of the Whole House on the
State of the Union and ordered to be printed

Mr. McMILLAN, from the Committee on the District of Columbia,
submitted the following

REPORT

[To accompany H. R. 6836]

The Committee on the District of Columbia, to whom was referred the bill (H. R. 6836) to amend the Policemen and Firemen's Retirement and Disability Act, having considered the same, report favorably thereon without amendment and recommend that the bill H. R. 6836 do pass.

The purpose of this legislation is to create an additional category of service-connected disability which will enable the member to retire if an injury or disease contracted other than exclusively in the performance of duty is so aggravated by the performance of duty as to disable the member from further duty, and to place the burden of proof on the Government that such duty did not aggravate the injury or disease contracted (it may or may not have been incurred or contracted in the performance of duty).

Such legislation is comparable to and in keeping with industrial compensation procedures.

A member retiring under this proposed legislation will receive the same annuity as if there was no doubt of the disability having resulted exclusively in the performance of duty.

On November 24, 1959, the Commissioners of the District of Columbia appointed a committee composed of representatives of the following departments in the District of Columbia government, the Police Department, the Fire Department, the Corporation Counsel's Office and the Chairman of the Board of Police and Fire Surgeons to investigate the possibility of an aggravation clause being added to the Police and Firemen's Retirement and Disability Act. This committee invited representatives of the Policemen's and Firemen's Associations to attend their discussions.

[p.2-POLICEMEN AND FIREMEN'S RETIREMENT AND DISABILITY ACT]

Many meetings were held with representatives of the above groups in attendance. Language was drafted and presented to the Board of Commissioners in March 1960. The Commissioners, after much study, approved the language and it is now embodied in H. R. 6836.

Plf's Ex. 7 (Cont'd)

COST

During the calendar years 1958, 1959, and 1960, the Policemen and Firemen's Retirement and Relief Board cleared 379 retirement cases, of which 292 were retirements for disability incurred in performance of duty (subsec. (g)), 23 were retirements for disability incurred not in the performance of duty (subsec. (f)), and 64 were optional retirements for age and service (subsec. (h)).

Based on the experience over the preceding 3 years, it is anticipated that the future costs of this legislation will be minor.

CHANGES IN EXISTING LAW

In compliance with paragraph 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as introduced, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

71 Stat. 394, subsection (g)

RETIREMENT FOR DISABILITY INCURRED WHILE PERFORMING DUTY

(g) (1) Whenever any member is injured or contracts a disease in the performance of duty or such injury or disease is aggravated by such duty at any time after appointment and such injury or disease or aggravation permanently disables him for the performance of duty, he shall upon retirement for such disability, receive an annuity computed at the rate of 2 per centum of his basic salary at the time of retirement for each year or portion thereof of his service: Provided, That such annuity shall not exceed 70 per centum of his basic salary at the time of retirement, nor shall it be less than 66 2/3 per centum of his basic salary at the time of retirement.

(2) In any case in which the proximate cause of an injury incurred or disease contracted by a member is doubtful, or is shown to be other than the performance of duty, and such injury or disease is shown to have been aggravated by the performance of duty to such an extent that the member is permanently disabled for the performance of duty, such disability shall be construed to have been incurred in the performance of duty. The member shall, upon retirement for such disability, receive an annuity computed at the rate of 2 per centum of his basic salary at the time of his retirement for each year or portion thereof of his service: Provided, That such annuity shall not exceed 70 per centum of his basic salary at the time of retirement, nor shall it be less than 66 2/3 per centum of his basic salary at the time of retirement.

[Filed June 28, 1962]

PLAINTIFF'S EXHIBIT 8

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

William R. Graham, Jr.

Plaintiff

v.

Walter M. Tobriner, et al.

Defendants

:
:
:
:
:
:

Civil Action No. 1291-62

MEMORANDUM OPINION

The Court is of the opinion that the entire record in this case overwhelmingly favors the position of the plaintiff. In addition to the medical testimony, the records of the Police Department and the Police Department clinic disclose that the plaintiff's ailment was consistently recognized as having been incurred in the line of duty. In spite of the testimony of Dr. Darrel C. Crain that gout is "believed to be a hereditary metabolic disease," there is nothing in the record to indicate that the plaintiff's affliction was not the result of the trauma resulting from the constant cranking of his motorcycle. Therefore, the action of the defendants sustaining the decision of the Police & Fireman's Retirement & Relief Board is arbitrary and unsupported by the evidence before the Board and before the defendants.

In evaluating the evidence comprising the record in this case, the Court is required by the Court of Appeals' decision in the case of Crawford v. McLaughlin, et al., 109 U.S. App. D.C. 264, to consider this evidence in the light of the "humane purpose of such retirement laws."

The Court will grant the motion of the plaintiff for summary judgment and by doing so denies the motion of the defendants for summary judgment.

/s/ EDWARD A. TAMM
JUDGE

Dated: 6/28/62

[Filed May 28, 1963]

**MOTION OF DEFENDANTS FOR AN ORDER RE-
ENTERING THE ORDER OF OCTOBER 24, 1961,
GRANTING DEFENDANTS' MOTION FOR SUM-
MARY JUDGMENT**

The defendants Walter N. Tobriner and F. G. Clarke, Members of the Board of Commissioners of the District of Columbia, move the Court to re-enter the Order of Judge Joseph C. McGarraghy, entered on October 24, 1961, granting defendants' motion for summary judgment in this action.

The United States Court of Appeals for the District of Columbia Circuit on November 2, 1962, Opinion No. 16,754, Hyde v. Tobriner, et al., ordered that:

"This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel.

"It appears that subsequent to the argument of this case on September 18, 1962, the Congress of the United States enacted and the President approved on October 23, 1962, Public Law 87-857, an Act amending the Policemen and Firemen's Retirement and Disability Act [Section 4-527(2), D.C. Code, 1961 Edition, Supplement II] .

"ON CONSIDERATION WHEREOF, it is ORDERED by the court that the judgment of the District Court on appeal herein is vacated and the case is hereby remanded to the District Court with directions to remand the case to the Commissioners of the District of Columbia for reconsideration in the light of the above-mentioned legislation, with opportunity to the parties, if so advised, to adduce additional evidence.

"It is further ORDERED by the court that each party shall bear his own costs on this appeal." The citation to the D.C. Code, contained within the brackets, has been added.

Pursuant to that Order, Judge McGarraghy, on December 10, 1962, vacated his Order of October 24, 1961, and remanded the case to the Commissioners of the District of Columbia for reconsideration in accordance with the provisions of the aforementioned Order of the United States Court of Appeals. The matter was reconsidered and, on February 26, 1962, the defendants reaffirmed their decision of November 15, 1960, sustaining the decision of the Police and Firemen's Retirement and Relief Board retiring Hyle in accordance with the provisions of Section 4-526, D.C. Code, 1951 Edition, for a disability not incurred in the performance of duty. In that connection, the defendants requested and received a written opinion from the Corporation Counsel of the District of Columbia concerning this matter, a copy of which is attached hereto as Defendants' Exhibit No. 20. It is the opinion of the Corporation Counsel, D.C., that the Act has no retroactive application and, therefore, does not apply to Hyde who was retired on April 26, 1960, almost two and one-half years prior to the effective date of the Act.

The facts and the law applicable to a consideration of this matter are the same as existed on October 24, 1961, when Judge McGarraghy, after hearing argument on the cross-motions for summary judgment, and after considering the pleading filed therein and the administrative record filed therewith, ordered that the defendants' motion be granted and that the plaintiff's motion be denied.

Therefore, consideration of the pleadings and the administrative record filed in this case demonstrate there is no genuine issue as to any material fact, that the record supports the action taken by the defendants and therefore, said defendants are entitled to a summary judgment as a matter of law.

The defendants, by reference, incorporate herein and ask to have read as a part hereof, their motion for summary judgment previously filed in this case, the memorandum of points and authorities in support of their motion, the record of the administrative proceedings relating to the retirement of Joseph R. Hyde, attached to that motion as defendants'

exhibits 1 through 16, consecutively, and supplementary administrative records which are attached hereto as defendants' exhibits numbered 17 through 22, consecutively.

/s/ Chester H. Gray
Corporation Counsel, D.C.

/s/ John A. Earnest
Assistant Corporation Counsel, D.C.

/s/ William F. Patten
Assistant Corporation Counsel, D.C.

Attorneys for Defendants
* * *

[Certificate of Service: May 28, 1963]

[Filed May 28, 1963]

**STATEMENT OF MATERIAL FACTS AS TO WHICH
DEFENDANTS CONTEND THERE IS NO GENUINE ISSUE.**

In compliance with Rule 9(h) of the United States District Court Rules, the defendants contend that the facts contained in the administrative record, which are attached to defendants' motion for summary judgment and defendants' motion for an order reentering the order of October 24, 1961, granting defendants motion for summary judgment, are the material facts on which there is no genuine issue.

/s/ Chester H. Gray
Corporation Counsel, D.C.

/s/ John A. Earnest
Assistant Corporation Counsel, D.C.

/s/ William F. Patten
Assistant Corporation Counsel, D.C.

Attorneys for Defendants
* * *

[Certificate of Service: May 28, 1963]

1 GOVERNMENT OF THE DISTRICT OF COLUMBIA
Executive Office

Appeal of: :
Pvt. JOSEPH R. HYDE :
to Decision of :
POLICE AND FIREMENS' :
RETIREMENT AND RELIEF BOARD :

Room 504, District Building
14th and E Streets, N. W.,
Washington, D. C.
Thursday, December 20, 1962

The above-entitled matter came on for hearing, pursuant to notice,
at 10:00 o'clock a.m.

COMMISSIONER WALTER N. TOBRINER, President of the Board
of Commissioners of the District of Columbia. (Chairman)
and
COMMISSIONER CLARK

MILTON D. KORMAN, Acting Corporation Counsel of the District of Columbia.

LYMAN UMSTEAD, Acting Corporation Counsel of the District
of Columbia

MR. LOW.

MR. PATTEN, Acting Corporation Counsel of the District
of Columbia

BERNARD MARGOLIUS, appearing on behalf of Private Hyde.

2 PROCEEDINGS

THE CHARIMAN: This case is the case of Private Hyde. You may proceed in the usual manner.

MR. MARGOLIUS: Gentlemen, this case comes here on a remand from the District Court, acting under a direction and order of the United States Court of Appeals, in the case of Joe Hyde versus the Commissioners.

The order of the Court of Appeals reads that subsequent to hearing of the case on September 13, 1962, in the Court of Appeals, Congress enacted the Public Law 87857 amending the Policeman Disability Act. The Court stated that on consideration whereof it is ordered by the Court that the judgment of the District Court on Appeals herein is vacated, and the case is hereby remanded to the District Court with direction it remand the case to the District of Columbia for reconsideration in the light of the above-mentioned legislation, with opportunity to the parties so advised to adduce additional evidence -- and I assume no additional evidence will be adduced before the Commissioner, before the Retirement Board. It will be before the Retirement Board.

I do not feel that it should be remanded; however, if the Board of Commissioners feels that the law is not clear and it should be clarified, then I would ask that it be remanded to the Retirement Board if clarification is needed in the minds of the Commissioners.

- 3 The medical opinion stated by the Dr. Maurice Mensh on behalf of the Board of Police and Fire Surgeons stated, it is my professional opinion that this officer's injuries is caused by or aggravated by his duty in the metropolitan police department. From the questioning on appeal, and gentlemen, I would like to say this is not evidence, but I would like put in the question and statement made by the Court. It would indicate that in absence of this Statute there was a liklihood that this case would have been reversed, but in light of the new statute having been enacted while it was under consideration, of course, they remanded the hearing before the Board of Commissioners to give consideration to the new statute, and I think that is the purpose of this order, if I may submit that. This new statute is familiar to the Board of Commissioners. It is more familiar to the Board than to me. It provides, if we recall, that where the cause of a person's disability, injury or condition is either unknown or is not related to duty, but is then aggravated by the performance of duty, then it shall be deemed to be in the performance of duty, and of course, whether we look at this now in light as a case of original injury or condition resulting from the duty, or aggravated by duty, the end result is the same. And, I feel in

4 light of this new statute, and in light of the Court's direction to look at this case now, in light of the new statute required by the new statute that this statement and evidence of the Board of Police and Fire Surgeons, it is either caused by or aggravated by. Therefore, we need not split hairs. That is sufficient to grant this man relief in the line of duty. That is our position.

THE CHAIRMAN: The legal question is whether the statute applies.

MR. MARGOLIUS: Well, whether or not the statute is applied, whether or not this falls within the statute. Now, I feel that the statute applies.

THE CHAIRMAN: Isn't the fundamental question whether the statute applies, because even though it does fall within the statute, if the statute doesn't apply, it wouldn't change the result.

MR. MARGOLIUS: If I understand correctly, whether or not --

THE CHAIRMAN: The question, it seems to me is whether the statute applies to a case that existed before.

MR. MARGOLIUS: Yes, that is what I thought before, not whether or not this falls within the statute, not whether or not the statute applies to the time element.

THE CHAIRMAN: That is correct.

5 MR. MARGOLIUS: I feel the Court of Appeals stated that in telling the Commissioners to consider this in light of the new legislation. I think the statement of the Court --

THE CHAIRMAN: Is there a subsequent opinion involving a similar case in which the Court of Appeals was less mandatory, if you like?

MR. MARGOLIUS: The Lovell Case.

THE CHAIRMAN: What did that say?

MR. MARGOLIUS: That said if the Commissioners feel it is applicable, or words of that effect.

THE CHAIRMAN: That is the Lovell Case, subsequent to this case.

MR. MARGOLIUS: Yes, it was a different bench.

As I recall it was only Judge Edgerton, on the Lovell Case, and let's see the other two were Bastian and Danahen; but in this case, you see we

are bound by what this case says.

THE CHAIRMAN: That is the question.

MR. MARGOLIUS: Well, it says to remand for reconsideration in the light of the above-mentioned legislation.

THE CHAIRMAN: Well, one of the things, I think particularly in view of the Lovell order should be considered whether the legislation applies or not. I don't read that order as holding that the legislation does apply. I think the question is left open for the determination of the Commissioners as to whether or not the statute has a retroactive application, which is perfectly a legal question, I think.

6 MR. MARGOLIUS: Very candidly, I did not come to argue that point, whether or not it is a retroactive legislation. I read this in the light for the Commissioners to consider this case and evidence in light of the new law.

THE CHAIRMAN: That was, it seems to me, a more plausible interpretation if we didn't consider the subsequent order in the Lovell Case in which it is left open for Commission determination as to whether the law applied.

MR. MARGOLIUS: Well, I can only say this, that in the argument of this case, the one before the Commission just now, the same statement was made by one, and perhaps two -- I know one Judge, who says, well, doesn't that law simply elaborate or explain the existing law?

THE CHAIRMAN: It is a question, not a statement.

MR. MARGOLIUS: It is more in a rhetorical statement the way it sounded to me, and so with this new law coming in, I read this in light of the argument. In other words, in light of what transpired at the argument.

THE CHAIRMAN: Let me ask you this: This case, if it were remanded to the Retirement Board, would you offer any additional evidence on the facts?

MR. MARGOLIUS: I would before the Retirement Board simply elaborate on --

THE CHAIRMAN: By testimony or by argument?

7 MR. MARGOLIUS: By testimony. I say elaborate. I would elaborate by Mr. Hyde, himself.

THE CHAIRMAN: You would introduce additional testimony?

MR. MARGOLIUS: The sum total would be the same. In other words, the end would be the same point to be proven; it would be the same.

THE CHAIRMAN: Would you hope that as a result of additional testimony a different set of facts would be presented?

MR. MARGOLIUS: No, no, the only thing --

THE CHAIRMAN: Then testimony would not be relevant, would it?

MR. MARGOLIUS: That is right.

Let me make my position clear so I don't prejudice anyone. We would prove that this man has certain injuries and certain ways he operated while he was a policeman.

THE CHAIRMAN: You have already proven that.

MR. MARGOLIUS: I wasn't there. The District was without counsel at the hearing before the Retirement Board. As I say, I would elaborate on that more, but the result would be the same. I would be proving the same point, but I would elaborate on it. I would also, if I introduced additional evidence, do no more than elaborate on the opinion already expressed, that this man's condition is caused by, or aggravated by his duty. That
8 has already been stated, so I would do no more than back that up, but since that is already in the record, all right.

THE CHAIRMAN: Do you, or do you not desire the opportunity to present additional testimony before the Retirement Board?

MR. MARGOLIUS: If the Board of Commissioners is not of the opinion, or did not conclude that this man's case falls within this new legislation and feels new testimony is not needed, then I would say I would like to send it back.

MR. KORMAN: I don't quite understand that last statement.

MR. MARGOLIUS: The Board of Commissioners may very well say,--I don't want to put any words in the Commissioner's mouth--

THE CHAIRMAN: Surely, it is just your hypothesis.

MR. MARGOLIUS: If the Board of Commissioners says the new legislation applies and therefore we don't have to look to the cause of this

condition, simply whether or not the work aggravated it, we already have that opinion, that it is aggravated. We don't have to search out whether the condition itself is caused by work, and that is where I think the difficulty would be in proof, whether or not it was actually caused by-- I don't think anyone can argue it was aggravated by. If the Commission feels the new law does not apply, then I would say in order to present

9 a better picture to the Court of Appeals again, because that is where we are going, it may be well to present a broader factual picture. The factual picture is skimpy.

THE CHAIRMAN: All right, we will hear from Corporation Counsel.

MR. PATTEN: Well, the Retirement Board, Mr. Commissioner, has heard the facts in this case as it was presented to the Board at that time and they determined that this was a disability not incurred in line of duty. That decision was sustained by the Commissioners, and on review to the District Court was sustained by the District Court. Now, on appeal to the Court of Appeals, they have remanded this matter to the Commissioners in light of this new legislation for reconsideration. The question is simply the legal question and that is whether or not this act has any retroactive application to Mr. Hyde's case. A remand to the Retirement Board for a new hearing, as I see it, serves no purpose. They have already heard this case once before.

THE CHAIRMAN: Let me see the mandate of the Court.

MR. KORMAN: I think this, Mr. Commissioner, that the language of the order, it says for the prehearing of additional testimony if so advised. I think that refers to the advice that each party may receive from his counsel to consider this an adversary proceeding, which I have never

10 considered it, but since there is counsel for the retiree, I think the determination as to whether he wants it put in testimony should be his without a preliminary decision by the Commissioners one way or the other. If I understand Mr. Margolius correctly, he is saying, tell us what is in your mind now about one facet of this, and if you arrive at a conclusion which isn't satisfactory, to me, then I think I want to go back and have another hearing. I think this is a determination he should

make on behalf of his client at this point in advance of any decision by the Commissioners or any facet of it.

MR. MARGOLIUS: No, I don't agree with that. What I meant to say was if the Board of Commissioners feels that the new statute applies and if they feel there is not adequate evidence--if the Commissioners feel there is not adequate evidence of aggravation, then new evidence can be obtained.

THE CHAIRMAN: Let me put this question to you.

Do you desire to adduce additional testimony before the Retirement Board?

MR. MARGOLIUS: I think, Mr. Commissioner, there has got to be a determination first whether or not this Board of Commissioners believes the new or old law applies. I think that is a legal determination by the Board of Commissioners.

11 THE CHAIRMAN: I don't think so. I don't think we should take two bites at it. If you want to adduce additional testimony before the Retirement Board, if my colleague agrees with me and in accordance with the mandate we will give you that right and then have it come here for the decision on any new facts that are adduced, plus the legal decision as to whether this statute is retroactive. I don't think we should take two bites at it.

MR. MARGOLIUS: I don't mean to give me two bits.

THE CHAIRMAN: No, I don't mean we should.

MR. MARGOLIUS: I am not asking you to give me two. All I am saying, the course of my evidence what shall it be directed to, and as I thought you mentioned, that is a legal question.

THE CHAIRMAN: You would be the sole judge as to the course of your evidence. My personal feeling would be that I think you ought to get the record in such shape that you want that presents the most favorable aspects of your client's case before it comes ultimately for a decision to this Board.

MR. MARGOLIUS: Then I ask that you remand it to them, and then let it come up through the channels.

THE CHAIRMAN: I think we are in strict conformity with the mandate, and in so doing, and it will be the order of this Board that it be remanded to the Retirement Board for such additional evidence as
12 either party may desire to adduce at that hearing.

MR. PATTEN: Commissioner, I would like to point out a possible hazard if it is remanded to the Retirement Board for a new hearing and works its way up to the Court of Appeals. It could very easily be said by that Court --

THE CHAIRMAN: This is the case that originated subsequent to the statute?

MR. PATTEN: Yes, they might say because of the fact that you had another hearing and took additional evidence subsequent to the date of the statute that the Act would not be applied retroactively and it would be a normal application under the statute.

THE CHAIRMAN: I don't see how we can avoid the clear direction of the Court in this mandate that opportunity be granted to the parties to adduce additional evidence if so advised. Can we, in the face of this language, deny to either party the right to take additional evidence before the Retirement Board?

MR. PATTEN: An opportunity to present the evidence in this case was fully exhausted at the Retirement hearing.

THE CHAIRMAN: Fully exhausted until the Court spoke.

MR. PATTEN: That is right. The question would now go to aggravation and as to that, it is strictly a legal question and that question would be whether the Act is applied retroactively as to the aggravation aspect.
13 I submit there is an extreme hazard in this case.

THE CHAIRMAN: It may be a hazard, Mr. Patten, but how do we avoid the clear direction of the Court?

MR. PATTEN: The legal determination should take precedent in this case, Mr. Commissioner.

THE CHAIRMAN: Suppose we made a legal determination that the statute was not retroactive and therefore our original decision should stand. At that time wouldn't counsel have the right to adduce additional evidence on a remand?

MR. PATTEN: There would be nothing left for reconsideration, Mr. Commissioner. There would be no need for any further evidence. The question would have been a legal one and would have been solved on the advice of counsel.

MR. LOW: What statute would the Board of Retirement receive and report and recommend the Commissioners as a result of this new hearing? He is saying that without a directive as to the legal application of this new statute, the Retirement Board is unable to formulate any recommendation following the hearing.

THE CHAIRMAN: The Retirement Board can make its own determination subject to our review of that determination.

MR. MARGOLIUS: Mr. Chairman --

MR. PATTEN: They have no guidelines to go by. They have no rules to go on.

14 THE CHAIRMAN: Do we have any more?

MR. PATTEN: Mr. Commissioner, you would have more if you had a legal opinion to this question. You certainly would have a great deal more than it stands now.

THE CHAIRMAN: Well, I agree, but I assume we would have a legal opinion at some stage of the proceeding.

MR. PATTEN: But at the time we would have had the benefit of that opinion.

THE CHAIRMAN: There is no reason why that legal opinion cannot be just as well made available to the Retirement Board.

MR. MARGOLIUS: Mr. President, may I say this: There is no harm in the Retirement Board making a finding, and one finding, this is either caused or not caused, and two, whether it is either aggravated or not aggravated. The issue is very clear. In other words, they make a cause finding and an aggravation, and then the issues are clear put.

MR. KORMAN: I see Mr. Patten's argument. It may be contrary to what I suggested earlier, but I think his point is this: That this is a completed case at this point, having been completed prior to anything done by Congress, and a remand for the taking of testimony ought not

to be granted unless there is a determination that the Act itself reopens the case because otherwise there would be a reopening of the matter and a final determination by the Retirement Board presented to the Commissioners as a fresh spot position after it.

15 THE CHAIRMAN: What do you do with this language of the Court?

MR. KORMAN: Frankly, I think that requires some study before I could give you a final answer. I thought as you had apparently that the language of it seems to dictate an opportunity to present evidence from the language itself but there is the point of view that Mr. Patten has expressed that we now have a completed case which was completed and decided before the Act was enacted, and if it is reopened, is it a completed case prior to the date of enactment?

THE CHAIRMAN: That may be a point of view, but that point of view does not negate the importance of this language.

MR. KORMAN: The question--and you raised the point, I think, correctly, that while this language here seems to be bothered directly, the subsequent decision in Lovell Case because that nothing further need be done unless the Commissioners determine that the Act applies.

THE CHAIRMAN: That is right, but we are dealing with a mandate in this particular case.

MR. PATTEN: Commissioners, I do not read into that order any determination by the Court on the question whether this Act is or is not
16 retroactive. As I see it, they are leaving this determination up to the Commissioners. The Lovell decision which I have here says new legislation recently enacted should also be considered and found applicable. They have, I think, clearly not made any determination or fixed their minds in any way on the question.

THE CHAIRMAN: Did anybody ask for clarification of this mandate at the time?

MR. KORMAN: No.

MR. MARGOLIUS: May I also say this doesn't read the way I think everybody has been interpreting--new legislation recently enacted should also be considered if found applicable, meaning if the facts apply to it.

That is what this should be read as. If the facts apply and it is an aggravation case.

THE CHAIRMAN: I don't read that that way.

GEN. CLARK: Let me ask one question as the one non-lawyer speaking in this case. If we were to follow the way I believe you interpret this, would this not mean that every case we have could be reopened where aggravation is involved?

MR. MARGOLIUS: No, no. I believe that only those cases could be reopened which are pending before the Commissioners.

THE CHAIRMAN: Or, before the Court.

17 MR. MARGOLIUS: Or, before the Court or in the process of going to Court. In other words, process of review.

GEN. CLARK: Why is that?

MR. MARGOLIUS: Now you are asking a legal question that is a little more difficult. I don't believe a case is final until it has been reviewed.

THE CHAIRMAN: And since the time for review has expired in most of the cases--

MR. MARGOLIUS: That is right. I don't think the Court is going to reopen. Let me say this: This amendment demonstrates the statement of the Court of Appeals in the Campbell Case as to the purpose of this law. This law has a very broad purpose. It should be interpreted very liberally and not by technicality and I think our Court of Appeals has said that in these orders.

Every retirement case that has come before the Court of Appeals has been reversed. I haven't seen one affirmed.

MR. PATTEN: I am not aware of any that have been sustained, but I ask you a question. There are approximately some 80 cases which this Act if applied retroactively might influence. How far back would you go in the application of this Act? And, when you use the word, under review, what do you mean by that? Applying it to cases which are under review.

18 MR. MARGOLIUS: Well, I am not ready to give an opinion on that because I may have to answer to the Court on that means later, but I don't believe that, for example, a case before the Court of Appeals on review of a set of facts, that when the law is interpreted and this is an amendment, but it is an interpretive amendment. In other words, this has been my contention all the time. This has been my contention for five, six years that this is actually what the law means today or has meant, and I consider this to be an interpretive amendment, not a new amendment.

MR. KORMAN: If you say every case is still opened, while it is being litigated and the final determination by the Commissioners can be attacked in the District Court any time within three years after their action, then this thing could go back three years to open all cases that have been decided upon as long as it is within the period of limitation.

MR. MARGOLIUS: I am not ready to answer that.

MR. UMSTEAD: In line with the General's question, I am sure his Secretary at the Board of Commissioners can apprise them right now that they have such cases whereby they are asking to reopen these cases that have been completed by reason of the question this act be applied retroactively and open up all of these.

19 MR. MARGOLIUS: Gentlemen, it may be that this is interpreted as an interpretive amendment. In other words, a clarifying amendment. The General remembers I have argued these cases before other Commissioners before Mr. Tobriner became Commissioner. I have always contended that aggravation can amount to additional limitation in line of duty.

MR. LOW: Mr. Chairman, may I point out the basic amendment as amended by this recent statute was it is a retroactive Act, but it was very specific as to the manner it was retroactive. It spelled out-- it went back to dictate some nine months before this present statute. The occasion of the Court of Appeals ruling had no meaning whatsoever of being retroactive. It was never submitted to the Congress as being retroactive.

THE CHAIRMAN: Do you have any of the legislative history of this amendment?

MR. MARGOLIUS: I don't think there is any. It was a Commissioner's bill.

THE CHAIRMAN: What was the testimony, if any, on the hearing? I think under the circumstances, General, we have to defer acting on this until we have a chance to study it more, but I do understand now that the record shows you are requesting a remand to the Retirement Board for the taking of additional testimony.

MR. MARGOLIUS: Yes, sir.

THE CHAIRMAN: All right.

20 MR. MARGOLIUS: Let the record show our position is that the statute does apply to us.

THE CHAIRMAN: All right, this hearing is now closed.

(Whereupon, at 10:30 a.m. the hearing in the afore-going matter was concluded.)

[Filed July 10, 1963]

ORDER

Upon consideration of the plaintiff's second motion for summary judgment, motion of defendants for an order re-entering the order of October 24, 1961, granting defendants' motion for summary judgment, the memorandum of points and authorities in support of and in opposition to the respective motions, the exhibits, and oral argument by counsel for plaintiff and counsel for defendants in open court, and upon consideration of the order of the United States Court of Appeals for the District of Columbia Circuit dated November 2, 1962, in Joseph R. Hyde v. Walter N. Tobriner, et al., Opinion No. 16,754, it is the finding of the Court that there is no genuine issue of material fact and the conclusion of the Court that the Act of Congress approved October 23, 1962, Public Law 87-857, "An Act To amend the Policemen and Fire-

men's Retirement and Disability Act", has no retroactive application and, therefore, it is, by the Court, this 10th day of July, 1963,

ORDERED: That the plaintiff's second motion for summary judgment be, and the same is, hereby denied, and it is

FURTHER ORDERED: That the motion of defendants for an order re-entering the Court's order of October 24, 1961, granting defendants' motion for summary judgment, be, and the same is, hereby granted, and it is

FURTHER ORDERED: That the Court's order of October 24, 1961, granting defendants' motion for summary judgment be, and the same is, hereby reinstated.

/s/ JOSEPH C. MCGARRAGHY
Judge

[Certificate of Service: July 8, 1963]

[Filed July 11, 1963]

NOTICE OF APPEAL

Notice is hereby given this 11th day of July, 1963, that Plaintiff Joseph R. Hyde hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 10th day of July, 1963 in favor of Walter N. Tobriner, et al., individual members of the Board of Commissioners, District of Columbia against said Joseph R. Hyde.

/s/ Bernard Margolius

/s/ Carleton U. Edwards, II

Attorneys for Plaintiff

* * *

* * *

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BRIEF FOR APPELLEES

263
UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 18,059

JOSEPH R. HYDE,

Appellant,

v.

WALTER N. TOBRINER, et al.,

Appellees.

Appeal From The United States District Court
For The District Of Columbia

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United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 7 1963

Nathan J. Paulson
CLERK

STATEMENT OF QUESTIONS PRESENTED

In the opinion of appellees, the questions presented are:

1. Where, in a case involving retirement from the Metropolitan Police Department, there is, on the question of the cause of appellant's disability, substantial evidence that the disability was, in fact, incurred otherwise than in the performance of duty, were not the Retirement Board and the Board of Commissioners compelled to conclude, as they did, that appellant's disability was occasioned other than in the performance of official duty, and, accordingly, was not the trial court correct in reinstating its order of October 24, 1961, granting summary judgment in favor of appellees?

2. Where a police officer was, in April 1960, retired for disability incurred other than in the performance of duty, and thereafter the Congress approved an amendment to the retirement law which permits retirement at a higher rate, if, in the performance of duty, a disease of doubtful origin is aggravated to such an extent as to cause permanent disability, was the police officer entitled to its benefits where such amendment was not made retroactive in its application?

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CASES CITED

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Board of Firemen's Relief and Retirement Fund

<u>Trustees of Houston v. Marks,</u> 150 Tex. 433, 242 S. W. 2d 181, 27 A. L. R. 2d 965	30
* <u>Cooper v. Retirement Board, etc.,</u> 131 Calif. App. Rep. 2d 804, 281 P. 2d 349	25
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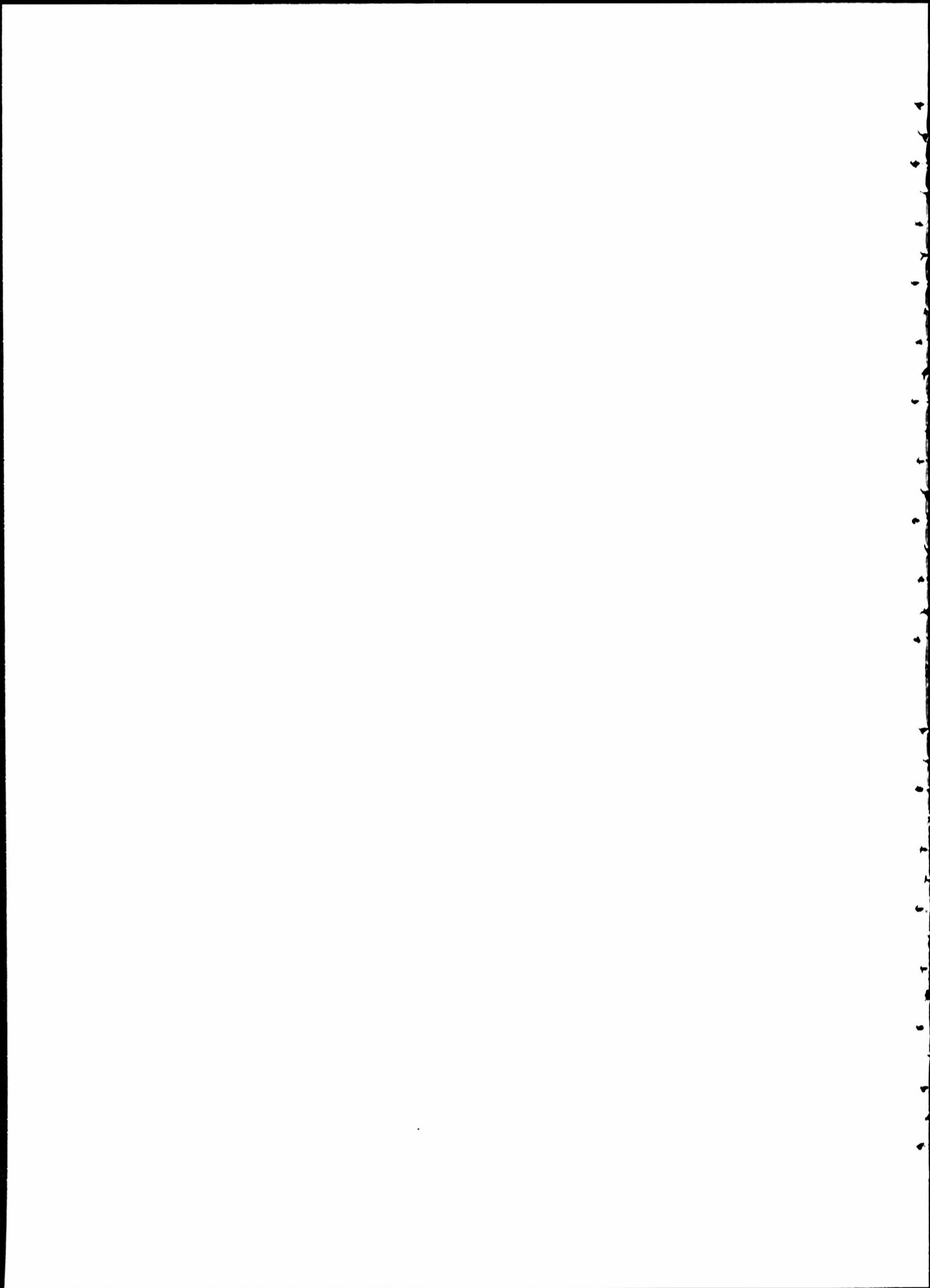
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OTHER AUTHORITY CITED

Metropolitan Police Department Manual, Chapter 38, § 9	31
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* Cases chiefly relied upon are marked by asterisks.



UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 18,059

JOSEPH R. HYDE,

Appellant,

v.

WALTER N. TOBRINER, et al.,

Appellees.

Appeal From The United States District Court
For The District Of Columbia

BRIEF FOR APPELLEES

COUNTER-STATEMENT OF THE CASE

Appellant, a former member of the Metropolitan Police Department, was, on April 21, 1960, ordered by the Police and Firemen's Retirement and Relief Board (hereinafter referred to as the Retirement Board) to be retired for disability resulting from a disease contracted other than in the performance of duty (J. A. 36). On appeal to the Commissioners of the District of Columbia, the action of the Retirement Board was, after a hearing, sustained (J. A. 57).

Thereafter, the appellant filed in the court below a complaint for mandatory injunction to require the appellees (1) to set aside their order affirming the action of the Retirement Board retiring appellant under Section 4-526, D. C. Code, 1961 (retirement for disability resulting from injuries received or disease contracted other than in the performance of duty), and (2) to enter instead an order retiring appellant under Section 4-527, D. C. Code, 1961 (retirement for disability resulting from injuries received or disease contracted in the performance of duty) (J. A. 1).¹

The matter came on for hearing on cross-motions for summary judgment. The court, upon consideration of the motions and attached exhibits, which consisted of the record of administrative proceedings before the Retirement Board and the Commissioners, entered its order granting appellees summary judgment and denying appellant summary judgment (J. A. 62).

An appeal from the order was taken to this Court (J. A. 62), and after oral argument, this Court, on November 2, 1962, entered

¹ Retirement under Section 4-526 results in an annuity of not less than 40 per centum of the basic salary, whereas retirement under Section 4-527 results in an annuity of not less than 66 $\frac{2}{3}$ per centum of the basic salary.

an order which reads in pertinent part:

"It appears that subsequent to the argument of this case on September 18, 1962, the Congress of the United States enacted, and the President approved on October 23, 1962, Public Law 87-857, an Act amending the Policemen and Firemen's Retirement and Disability Act.

"ON CONSIDERATION WHEREOF, it is ORDERED by the court that the judgment of the District Court on appeal herein is vacated and the case is hereby remanded to the District Court with directions to remand the case to the Commissioners of the District of Columbia for reconsideration in the light of the above-mentioned legislation, with opportunity to the parties, if so advised, to adduce additional evidence."

The Commissioners, upon remand of the case, heard argument of counsel (J. A. 81-93), and referred the matter to the Corporation Counsel for a written opinion on the question of the applicability of Public Law 87-857, supra. In a written opinion dated February 25, 1963 (J. A. 69-73), the Corporation Counsel concluded as follows:

"I conclude, therefore, that the Act of October 23, 1962 (Public Law 87-857) has only prospective application. It follows that additional testimony is neither necessary nor advisable. The retirement of Joseph R. Hyde was decided by the Commissioners on December 1, 1960 under the then applicable provisions of law relating to his retirement.

The Commissioners' reconsideration of the Hyde case in the light of Public Law 87-857, as directed by the Court, is therefore limited to making the determination that the statute is not applicable to this case and that their decision of December 1, 1960 is reaffirmed." (J. A. 73.)

Thereafter, the Commissioners reaffirmed their order of November 15, 1960, sustaining the determination of the Retirement Board retiring appellant for disability not incurred in the line of duty (J. A. 73-74).²

Appellant then filed in the court below a "Second Motion for Summary Judgment," together with a supporting affidavit and other exhibits (J. A. 63). The appellees moved the court for an order re-entering the order of October 24, 1961, granting appellees' motion for summary judgment (J. A. 78). Following a hearing on the motions, the court, on July 8, 1963, entered an order which reads in pertinent part:

"* * * [It] is the finding of the Court that there is no genuine issue of material fact and the conclusion of the Court that the Act of Congress approved October 23, 1962, Public Law 87-857, 'An Act To amend the

² The administrative determination was based upon facts, established at a hearing on November 5, 1959, and April 21, 1960, which, for the convenience of the Court, are set forth at the conclusion of the counter-statement of the case.

Policemen and Firemen's Retirement and Disability Act', has no retroactive application and, therefore, it is, by the Court, this 10th day of July, 1963,

"ORDERED: That the plaintiff's second motion for summary judgment be, and the same is, hereby denied, and it is

"FURTHER ORDERED: That the motion of defendants for an order re-entering the Court's order of October 24, 1961, granting defendants' motion for summary judgment, be, and the same is, hereby granted, and it is

"FURTHER ORDERED: That the Court's order of October 24, 1961, granting defendants' motion for summary judgment be, and the same is, hereby reinstated." (J. A. 93-94.)

Appellant then filed his second appeal to this Court (J. A. 94).

The Administrative Proceedings

On June 16, 1943, appellant, at age 33, was appointed a member of the Metropolitan Police Department and, in 1945, was assigned to the Traffic Division as a motorcycle officer (J. A. 8, 25). While appellant was serving in that capacity, the Board of Police and Fire Surgeons recommended, on October 13, 1959, that he appear before the Retirement Board for consideration of disability retirement (J. A. 28). The recommendation stated that appellant was disabled as a result of "[g]outy and mixed hypertropic arthritis hip, knee, ankle" (J. A. 28).

On November 5, 1959, the Retirement Board conducted a hearing at which a letter, dated October 12, 1959, addressed to the Board of Police and Fire Surgeons by James A. O'Keeffe, M. D., one of its members, was read into the record. The letter reads:

"Private Joseph R. Hyde, a member of the Metropolitan Police Department has been under my professional care for the past two years.

"The diagnosis is gouty and mixed hypertrophic arthritis of the hip, knee and ankle.

"Adequate and prolonged therapy by the undersigned and of competent specialists has failed to rehabilitate this officer.

"He is unable to further perform his duties as a policeman and should appear before the Retirement and Relief Board in consideration of retirement. The disability rating is 50 percent.

"It is my professional opinion that this officer's arthritis is caused by or aggravated [sic] by his duties in the Metropolitan Police Department" (J. A. 12, 14).

Appellant testified that he had suffered for the past eight or nine years from the condition described by Dr. O'Keeffe, and that it seemed to be getting worse (J. A. 15). Appellant attributed his disability to injuries received while assigned to motorcycle duty, but he was unable to recall any specific instances of injuries (J. A. 15, 16). In this regard he said: "* * * The only thing I can

figure, by being on the right side, it [his disability] could have been from cranking the motorcycle. * * * (J. A. 15.)

Appellant's personnel record disclosed that the only injury received in the performance of duty occurred on May 7, 1953. It appears that appellant, at that time, sprained his right knee when his motorcycle engine backfired causing the starter pedal to kick back. The injury was described as being "not serious" (J. A. 11). Records of the Police and Fire Clinic disclose that as a result of the accident appellant was on sick leave for ten days and that he was treated for a contusion of the right knee (J. A. 9).

The Police and Fire Clinic records also reveal that appellant was from time to time treated for other injuries, but that such injuries were not indicated as being received in the performance of duty. In 1948 he was treated for contusions of the left and right knee, and in 1949 for a sprained left knee (J. A. 9). Beginning in 1950 and continuing through May 22, 1959, when appellant went on his final sick leave, he was treated on numerous occasions for sciatica, gout, gouty arthritis or arthritis of both legs (J. A. 9, 10).

During the hearing before the Retirement Board, appellant referred to medical reports not appearing in the personnel file, but which he claimed would support his contention that he was

entitled to be retired for disability incurred in line of duty (J. A. 16, 19-21). The hearing was continued until April 21, 1960, at which time such reports from Eugene J. McDonald, M. D., and Darrell C. Crain, M. D., were considered (J. A. 30).

Dr. McDonald merely reported the results of his examination without diagnosis. His report showed that X-rays were taken of appellant's lumbar spine, right hip and right knee; that certain discs in the spine were roughened possibly due to an old trauma; and that there was no evidence of damage to the hip and knee (J. A. 31, 32).

Dr. Crain diagnosed appellant's condition as " * * * first, gout which is now going into a chronic state and second, some early osteoarthritis incident to his age." Dr. Crain was of the opinion that appellant had gout of ten years duration, with increasing difficulty, indicating a beginning state of chronic gouty arthritis (J. A. 32, 34). The critical paragraph of Dr. Crain's report clearly shows that, while appellant seemed to think his ailment derived from some injury, it was not that at all, but was attributable to a pathological condition which is commonly known to exist in many people. The paragraph reads as follows:

"His chief complaint and present illness: 'Painful joints. Onset approximately 10 years ago, when the patient suddenly developed an acutely swollen knee. This was painful and red. He is a motorcycle policeman and felt that he probably had unconsciously injured it. He stayed off from work for several days and the condition cleared. However, within a few months a similar attack recurred. After he had had several attacks in a year he was sent by the Policemen's Clinic for studies and it was found that he had an elevated uric acid. He was put on Colchicine and says that following the starting of this drug he had fewer attacks. Nevertheless the same thing recurred off and on but at less frequent intervals. That is to say he would again have acutely swollen right knee or a right ankle. This situation continued almost 10 years until May of this year. On May 2 he again had a severe attack and when this continued he was finally hospitalized at Providence Hospital about May 27, remaining there until June 5. He says that when he went in only the knee was involved. He was then started on Cortisone and very shortly thereafter the right ankle and the right hip became involved, too. Cortisone was discontinued and he was put back on Colchicine which he has continued to the present time. There has been some modest improvement in the condition, but he still has pain and swelling in the right knee, causing him to limp when he walks.' " (J. A. 33.)

Dr. Crain then recommended the following treatment:

- " ' 1. Read Gout Book.
- ' 2. Adhere closely to diet.
- ' 3. Today inject right knee with Hydrocortisone.

- ' 4. Start Butazolidin, taking 600 mgm today and 800 mgm the next three days.
- ' 5. Report in four days for further injection and at that time decrease Butazolidin dosage.' " (J. A. 34-35.)

Neither report indicated in any way that appellant contracted gout or osteoarthritis as a result of any injury incurred in line of police duties.

On May 12, 1960, the Commissioners, relying upon the recommendation of the Board of Police and Fire Surgeons, approved excessive sick leave for appellant (J. A. 13). The leave was routinely approved on the basis of the statement that appellant's sickness which, at that time, was described as "phlebitis rt. leg" and "gouty arthritis," was a direct consequence of injury received in the performance of duty (J. A. 13).

STATUTES INVOLVED

District of Columbia Code, 1961:

Section 4-533:

"The Commissioners shall consider all cases for the retirement of members and all applications for annuities under sections 4-521 to 4-535. In each case of retirement of a member the Commissioners shall certify in writing the physical condition of the member for whom retirement is sought. The

Commissioners shall give written notice to any member under consideration by them for retirement to appear before them and to give evidence under oath. The proceedings before the Commissioners involving the retirement of any member, or any application for an annuity under sections 4-521 to 4-535, shall be reduced to writing and shall show the date of appointment of such member, his age, his record in the service, and any other information which may be pertinent to the matter of such retirement or annuity. The Commissioners are authorized to administer oaths and affirmations, may require by subpoena or otherwise the attendance and testimony of witnesses and the production of documents at any designated place. * * * (Sept. 1, 1916, ch. 433, § 12(m), as added Aug. 21, 1957, 71 Stat. 397, Pub. L. 85-157, § 3.)"

Title I, Administration, Appendix.

Reorganization Order No. 31 -- Police and
Firemen's Retirement and Relief Board

Part I

"Police and Firemen's Retirement and Relief Board. -- (a) There is established in the Government of the District of Columbia, under the administrative supervision of the Director of General Administration a Police and Firemen's Retirement and Relief Board, to be composed of the following: Personnel Officer, Director of Public Health, Corporation Counsel, Chief of Police, and Fire Chief.

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Part III

"Functions. -- The functions of the Police and Firemen's Retirement and Relief Board shall be to:

(1) Consider all cases for the retirement and the relief of members of the Police and Fire Departments of the District of Columbia, * * *.

(2) * * * [A]ny action taken by the Retirement and Relief Board shall be subject to review by the Board of Commissioners, including final authority to concur in, reject, modify, or reverse such action.

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Part IX

"The Police and Firemen's Retirement and Relief Board established herein is hereby designated, as agent of the Commissioners, to make all findings of fact necessary in the determination of eligibility for retirement and survivor annuities pursuant to Public Law 85-157 [see §§ 4-521 to 5-535, Chap. 5, D. C. Code], 85th Congress, as approved August 21, 1957, and to take final action in such cases subject to provisions for review set forth in Reorganization Order No. 31, as amended."

RULE INVOLVED

Policy and Procedural Rules for Guidance of the Police and Firemen's Retirement and Relief Board, D. C.

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VIII Appeal and Review

"a. An appeal from any final decision of the Board may be made in writing to the Board of Commissioners, D. C., within twenty (20) days after such decision has been mailed or otherwise delivered to the person affected by such decision."

SUMMARY OF THE ARGUMENT

Because on the whole of the administrative record there is substantial evidence that appellant's disability was incurred other than in the performance of duty, the court below did not err when it reinstated its order of October 24, 1961, granting appellees summary judgment.

The amendatory Act approved October 23, 1962, which provides for retirement at the higher annuity rate when a non-service connected injury or disease becomes aggravated by the performance of duty so as to result in permanent disability, did not have the effect of conferring upon appellant any greater retirement right, because the amendment was not made retroactive and it, therefore, applies only to those cases which are considered by the Retirement Board subsequent to the effective date of the Act.

ARGUMENT

I

A police officer may not be retired at the higher pension rate if he contracts a disease, resulting in permanent disability, otherwise than in the performance of duty.

The appellant does not challenge the legality of the administrative procedure followed in this case, nor does he challenge the administrative determination that he is physically incapacitated for further duty as a police officer. What he does challenge is the validity of the administrative decision that his disability was not incurred in the performance of police duty.

In support of his contention that he should have been retired for disability incurred in the performance of duty, appellant argues first that Section 4-527, D. C. Code, 1961, which provides for retirement at the higher rate, is applicable whenever a non-service connected disease becomes aggravated by police duties to such an extent as to become permanently disabling.

Section 4-527, D. C. Code, 1961, provides, in pertinent part, that:

"Whenever any member is injured or contracts a disease in the performance of duty or such injury or disease is aggravated

by such duty at any time after appointment and such injury or disease or aggravation permanently disables him for the performance of duty, he shall upon retirement for such disability, receive an annuity * * * [of not less than 66 2/3 per centum of his basic salary at the time of retirement]. "

The above language clearly provides for retirement in only two situations: (1) when a finding is made that an officer is permanently disabled as a result of injury received or disease contracted in the performance of duty; or (2) when a finding is made that an officer was injured or contracted a disease in the performance of duty and was not permanently disabled, but that subsequently, during the performance of duty, such injury or disease was aggravated so as to permanently disable him.

The appellant, citing numerous tort cases and cases decided under the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. A. 901 et seq., argues that " * * * it is well settled law that one is deemed to be injured as the result of an accident for which he can recover damages or in the case of an employee, receive workmen's compensation, to the full extent of the disabilities arising from such accident, even though the injuries may have been aggravated by reason of a pre-existing physical condition, or by

reason of a latent disease, rendering the injuries more serious than they would have been had the person been in robust health. * * * " (Appellant's emphasis, appellant's supplemental brief, p. 8.)

While the foregoing statement of the law is undoubtedly correct, it has no applicability to the statute here involved. In the workmen's compensation cases the administrator and the courts were free, under the statute which defined the word "injury," to allow recovery where a non-service connected injury or disease was aggravated by the performance of duty. The Congress, however, in enacting the Policemen and Firemen's Retirement and Disability Act, did not leave open the possibility of any such broad construction, because it specifically provided that the higher pension rate may be granted only where there is (1) a service-connected disabling injury or disease, or (2) a service-connected non-disabling injury or disease which, as a result of the performance of duty, thereafter becomes disabling.

In addition to the plain wording of Section 4-527, supra, the appellees are further fortified in their interpretation of the statute by the action of the Congress in amending the statute. The Congress, on October 23, 1962, amended the Policemen and

Firemen's Retirement and Disability Act by providing for retirement at the higher annuity rate in cases where, while in the performance of duty, an injury or disease of doubtful origin becomes aggravated to such an extent as to become permanently disabling. This amendment, in pertinent part, provides:

"(2) In any case in which the proximate cause of an injury incurred or disease contracted by a member is doubtful, or is shown to be other than the performance of duty, and such injury or disease is shown to have been aggravated by the performance of duty to such an extent that the member is permanently disabled for the performance of duty, such disability shall be construed to have been incurred in the performance of duty. * * *"
(Section 4-527 (2), D. C. Code, 1961, Supp. II.)

Obviously then, the statute, as it existed at the time appellant was retired (i. e., prior to October 23, 1962), cannot be construed as appellant contends it should be, for such an interpretation would require a holding that the carefully-considered action of the Congress in amending the statute was completely unnecessary and served no useful purpose. It is, of course, axiomatic that no Act of Congress should be so construed unless such a result is manifestly compelled. And clearly that is not the case here.

The appellant argues that the Congress amended the statute for the sole purpose of correcting an administrative misinterpretation of its intention. The legislative history of the amendment, however, absolutely refutes any such suggestion. Nowhere is there the slightest indication that the amendment was enacted for this purpose. On the contrary, both the House and Senate Reports³ indicate that the purpose of the legislation was

" * * * to amend existing law so as to create an additional category of service-connected disability which will enable policemen and firemen to retire if an injury or disease contracted other than exclusively in the performance of duty is so aggravated by the performance of duty as to disable the member from further duty." [Emphasis supplied.]

Moreover, as clearly appears from Senate Report No. 2271, supra, it was the Commissioners of the District of Columbia, and not the Congress, who instigated the amendatory legislation. Any suggestion then that such legislation was passed solely to correct an administrative misinterpretation of the intent of the Congress, rather than "to create an additional category of service-connected

³ H. R. Report No. 892, 87th Cong., 1st Sess., and Senate Report No. 2271, 87th Cong., 2d Sess., which accompanied H. R. 6836, 87th Cong., 1st Sess.

disability" cannot be sustained. It must be manifest that, in enacting the amendment of October 23, 1962, the Congress clearly recognized and acknowledged that under the law in effect prior thereto (and at the time of appellant's retirement), a police officer disabled as a result of the aggravation, by the performance of duty, of a non-service connected injury or disease was not eligible for retirement for disability incurred in the performance of duty.

II

The October 23, 1962, amendment to the Retirement Act is not applicable to the appellant, who was retired on April 21, 1960.

The Policemen and Firemen's Retirement and Disability Act of September 1, 1916, was amended on two occasions. The first was on August 21, 1957, and the second on October 23, 1962. Whereas the Congress, in enacting the amendments of August 21, 1957 (71 Stat. 394), specifically provided that such amendments were to be effective retroactively to October 1, 1956, no such provision for a retroactive effective date was inserted in the amendment of October 23, 1962 (Public Law 87-857). Obviously, therefore, the Congress could not have intended that the latest amendment should be applied retroactively. This is further borne out by the legislative history of the most recent amendment.

Senate Report No. 2271, 87th Congress, 2d Session (1962),

states, in pertinent part:

"The purpose of this bill is to amend existing law so as to create an additional category of service-connected disability which will enable policemen and firemen to retire if an injury or disease contracted other than exclusively in the performance of duty is so aggravated by the performance of duty as to disable the member from further duty.

"A member retiring under this proposed legislation will receive the same annuity as if there was no doubt of the disability having resulted exclusively in the performance of duty. Such legislation is comparable to and in keeping with industrial compensation procedures.

"The Fiscal Affairs Subcommittee of this committee held a hearing on H. R. 6836 on August 1, 1962, and received favorable testimony from representatives of the Board of Commissioners of the District of Columbia, the Fire Department, and the Police Department, as well as representatives of the Firemen's Association, and the Policemen's Association. At this time the subcommittee was informed that during the calendar years 1958, 1959, and 1960, the Policemen and Firemen's Retirement and Relief Board cleared 379 retirement cases, of which 292 were retirements for disability incurred in performance of duty, 23 were retirements for disability incurred not in the performance of duty, and 64 were optional retirements for age and service. Based on the experience over the preceding 3 years, it is anticipated that the future costs of this legislation will be minor." [Emphasis supplied.]

House Report No. 892, 87th Congress, 1st Session (1961)
is to the same effect.⁴

In addition to couching the reports in terms of future application, it is noted that, although there is mention of the number of retirements in 1958, 1959 and 1960 for disability incurred not in the performance of duty, there is no indication in the reports that the Congress intended that the additional category of service-connected disability should be made applicable to such retirees.

Under the appellant's interpretation of Public Law 87-857, many of those who were retired long before October 23, 1962, for disability not incurred in the performance of duty, would be entitled to the benefit of the liberalizing amendment. The appellant's argument is that Public Law 87-857 applies to all cases which were not finally determined on the date of its enactment. Since his case was in litigation at the time of the enactment of Public Law 87-857, he concludes that it was not finally determined. This argument, carried to its logical conclusion, would mean that Public Law 87-857

⁴ The appellant's quote from H. R. 892, supra, appearing on p. 14 of his supplemental brief, is not relevant. This statement does not appear in the Senate Report, and is apparently based on an amendment which was proposed but rejected by the Congress.

is applicable to all cases which were before the Retirement Board within the last three years, irrespective of whether they are presently in litigation. Under this theory, a decision of the Board would not be final until the expiration of the three-year period within which a suit may be filed in the District Court. Obviously, the Congress would have specifically provided for this result if such were intended.

The appellees wish to point out, in passing, that the appellant would not, even under his construction of Public Law 87-857, be entitled to the higher rate of retirement. This amendment provides for retirement at the higher rate only when the non-service connected injury or disease " * * * is shown to have been aggravated by the performance of duty to such an extent that the member is permanently disabled for the performance of duty * * * ." There is no showing in the record that the performance of duty aggravated the appellant's disease so as to cause it to become disabling. The most that can be said is that appellant was suffering from a degenerative disease which manifested itself by pain when using that part of the body which was affected. This falls short of the requirement of the statute that the ultimate disabling effect

of the disease must be hastened by the performance of duty in order to be entitled to the higher pension rate.

III

There is substantial evidence in the administrative record to support the finding that appellant's disability resulted from a disease received other than in the performance of duty.

Section 4-533, D. C. Code, 1961, provides that "[t]he Commissioners shall consider all cases for the retirement of members [of the Police Department] and all applications for annuities under sections 4-521 to 4-535. * * *"⁵ However, the Retirement Board, which was created by Reorganization Order No. 31, D. C. Code, 1961, Title I, Administration, Appendix, page 100, has been made the agent of the Commissioners " * * * to make all findings of fact necessary in the determination of eligibility for retirement and survivor annuities * * *." The Reorganization Order provides further that " * * * any action taken by the Retirement and Relief Board shall be subject to review by the Board of Commissioners, including final authority to concur in, reject, modify, or reverse such action."

⁵ Act of September 1, 1916, 39 Stat. 718, ch. 433, as amended by the Act of August 21, 1957, 71 Stat. 394.

From the foregoing, it is readily apparent that vested in the Retirement Board, subject to review by the Commissioners, is the responsibility of determining whether a disability necessitating the retirement of a policeman or fireman was or was not incurred in the performance of duty. Here the Board, having conducted a hearing and, on the basis of substantial evidence, having made a determination that appellant's disability was incurred other than in the performance of duty, the court below properly refused to substitute its judgment. See Selden, et al. v. Capitol Hill Southeast Citizens Association, et al., 95 U. S. App. D. C. 62, 219 F. 2d 33, cert. den. 349 U. S. 944.

The fact that a court, upon a consideration of the same facts, might have reached a different conclusion does not alter this basic principle. As the Supreme Court of the United States said in the case of Gray, Director of the Bituminous Coal Division of the Department of the Interior, et al. v. Powell, et al., 314 U. S. 402:

"Where, as here, a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched. * * * It is not the province of the court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action."
(p. 412.)

Therefore, in reviewing the record in this case, the Court need not be concerned with whether the facts will support a finding that appellant's disability resulted from a disease contracted in the performance of duty, but, instead, whether there is a rational basis for the finding that appellant's disability resulted from a disease contracted other than in the performance of duty. Cooper v. Retirement Board, etc., 131 Calif. App. Rep. 2d 804, 281 P. 2d 349; Rochester Telephone Corp. v. United States et al., 307 U. S. 125.

In the Cooper case the Retirement Board found and the trial court sustained the finding that a policeman died from a non-service connected disability. In affirming the decision of the lower court, the appellate court stated:

"It is appellant's contention that such findings are totally unsupported and that the evidence compels, as a matter of law, a finding that death was caused by a service-connected illness. Of course, on such an appeal, it is appellant's burden to show that the evidence and the reasonable inferences therefrom do not support the findings of the Board. * * * The respondent enjoys in its favor all inferences arising from conflicts in the evidence, even though an equally reasonable adverse inference is possible. * * * In other words, the appellant must not only show that a finding in her favor would have been supported,

but must demonstrate that such finding is compelled, as a matter of law." [Cases omitted.] (p. 350.)

To the same effect the Court, in Loveland v. City of Oakland et al., 80 Calif. App. Rep. 2d 31, 180 P. 2d 937, stated:

" * * * The burden was upon appellant to establish the cause of death * * * and in the face of the adverse finding below she bears the heavy burden before this court of showing, not that the evidence will support a finding that her husband's service-connected injury caused his death, but rather that it will not support the contrary finding actually made; or, to put it affirmatively, appellant must convince us that the evidence compels a finding that her husband's death was caused by the injury for which he was pensioned." [Cases omitted.] (p. 939.)

The appellant, in arguing that the Retirement Board erred in finding that the disease was contracted other than in the performance of police duties, relies heavily upon the following conclusionary statement appearing in Dr. O'Keeffe's letter: "It is my professional opinion that this officer's arthritis is caused by or aggravated by his duties in the Metropolitan Police Department" (J. A. 12, 14). Paraphrasing Dr. O'Keeffe's language, appellant's arthritis was contracted in the performance of police duties, or, in the alternative, his arthritis was contracted in some other manner and thereafter aggravated by such police duties. Because

of the ambiguity in the letter, Dr. O'Keeffe's statement, instead of supporting appellant's contention, raised considerable doubt whether he is entitled to be retired under Section 4-527, as he contends.

Appellant points to his own testimony as support for his position. He testified that he had been assigned to motorcycle duty since 1945 (J. A. 17); that he "cranked" or started his motorcycle by depressing a foot lever 30 or 40 times during a tour of duty (J. A. 20); that he had received injuries mainly to his right side as a result of the motorcycle engine backfiring (J. A. 15); and that he attributed his present condition to the injuries he received as a motorcycle officer (J. A. 15-17). But, in spite of appellant's protestations, he was unable to recall any specific accident that could reasonably have caused his disability. His personnel record discloses that on only one occasion, in 1953, he complained that his right knee was injured, but not seriously, as a result of the backfiring of his motorcycle engine as described (J. A. 11).

Significantly enough, Dr. McDonald's views after X-ray examination did not disclose incidents of trauma or injury to appellant's right hip or knee. What was revealed was evidence of an old trauma of the spine. Appellant, however, apparently does

not have arthritis of the spine (J. A. 31, 32). Dr. Crain reported that appellant had for the past 10 years suffered from gout and osteoarthritis, and that, in his opinion, they were progressive and incidental to his age (J. A. 32-35).

Appellees had before them an ambiguous letter by Dr. O'Keeffe, appellant's indefinite testimony, a report of an inconsequential injury received in performance of duty in 1953, reports of other inconsequential injuries received other than in the performance of duty, and the reports of two doctors, not members of the Board of Police and Fire Surgeons, which indicated that appellant's disabling condition was not caused by injury received in the performance of duty, but that such condition had existed since 1950, some three years prior to the only injury received in performance of duty.

Thus, considering the record as a whole, appellees could have reasonably concluded, as they undoubtedly did, that the condition which finally disabled appellant from further performance of police duty was a progressive degenerative condition of gout and osteoarthritis of some ten years duration and incident to his age. Further, that the injury which occurred in performance of duty and the other injuries which were not incurred in performance of duty were of minor nature insofar as they could have affected appellant's debilitating condition.

In Ruedlinger v. Long, ___ Mo. App. ___, 283 S. W. 2d 889, a case similar to the instant one, a police officer claimed he was entitled to retirement for disability incurred in line of duty. The officer, suffering from osteoarthritis of the right hip, contended that his condition became disabling only when aggravated by a series of injuries received while on police duty.⁶ The medical testimony before the Retirement Board was to the effect that the arthritis had an infectious origin which probably developed over the years or which may have been caused by injuries. The court ruled that, on the basis of all the evidence, the Board could have justifiably found, as it did, that the officer's condition was not incurred in line of police duty. The court concluded by saying at p. 893:

"The question brought here for review is whether the decision disallowing relator's claim is supported by competent and substantial evidence upon the whole record, or is arbitrary, or for any other reason unauthorized by law. * * *"

⁶ The St. Louis retirement statute, unlike ours, provides for retirement when an officer becomes incapacitated due to an injury received in line of duty which aggravates a pre-existing condition not incurred in line of duty.

See also: Board of Firemen's Relief and Retirement Fund Trustees of Houston v. Marks, 150 Tex. 433, 242 S. W. 2d 181, 27 A. L. R. 2d 965; Benedict v. Board of Police Pension Fund Commissioners of Seattle, et al., 35 Wash. 2d 465, 214 P. 2d 171, 27 A. L. R. 2d 992.

Appellant relies heavily on Crawford v. McLaughlin, et al., 109 U. S. App. D. C. 264, 286 F. 2d 821 (Appellant's original brief, p. 20). But that case, similar only in that it is also a police retirement case, is easily distinguishable from the instant case because of two factors. In Crawford there was an absence from the administrative record of evidence that carpentry work performed outside of police duty was a factor in Crawford's disability; and in the instant case the administrative record contains no substantial evidence that appellant's disability was a consequence of any act within the performance of official duty.

Appellant contends next that, because appellees granted him excessive sick leave by approving a certification of the Board of Police and Fire Surgeons that he was entitled to such leave due to disability incurred in performance of duty (J. A. 13), appellees should not thereafter be heard to say that the disability was incurred other than in the performance of duty. This contention is without

substance. Members of the Board of Police and Fire Surgeons are authorized by regulation ⁷ to make recommendations, in cases where injury or disease is contracted in performance of police duty, that the disabled officer be granted sick leave in excess of thirty days or that he receive at District expense medical treatment not available in District of Columbia facilities. But such authority is limited as stated and cannot be construed as justification for usurping the functions of the Retirement Board or of the Commissioners in the determination of the eligibility of a police officer for retirement. As demonstrated previously, the function of determining eligibility of a police officer for retirement is vested solely in the appellees or their designated agent, and the designated agent is the Retirement Board.

Appellant contends finally that the burden of proving that he was entitled to the more favorable retirement under Section 4-527, D. C. Code, 1961, was improperly imposed on him. This contention is without substance. Proceedings before the Retirement Board and before the appellees are non-adversary in nature. The very purpose of such proceedings is to receive all relevant evidence pertaining

⁷ Metropolitan Police Department Manual, Chapter 38, § 9.

to the disability in question in order that a proper determination can be made as to whether it is service connected or non-service connected. The record shows that at the Retirement Board the appellant was given a hearing, the sufficiency of which he does not question, that all departmental records were received, and that he was afforded every opportunity to supplement departmental records concerning his disability. The same can be said regarding his hearing before the appellees.

It is quite apparent that both the Retirement Board and the Commissioners considered every bit of evidence put before them and evaluated all of it with the sole purpose of arriving at a fair and equitable conclusion without any regard for the question of the burden of proof. Moreover, it is plain that, whatever view may be taken of appellant's contention respecting the burden of proof, it is immaterial in the disposition of the questions presented. As stated above, appellees' decision should be upheld if there is substantial evidence to support it or a rational basis upon which to bottom it, and it is in accordance with the law.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the finding of the Retirement Board that the appellant's disability resulted from a disease incurred other than in the performance of duty was made in accordance with the applicable law and that it has substantial support in the administrative record. The judgment of the court below was, therefore, in all respects correct and should be affirmed.

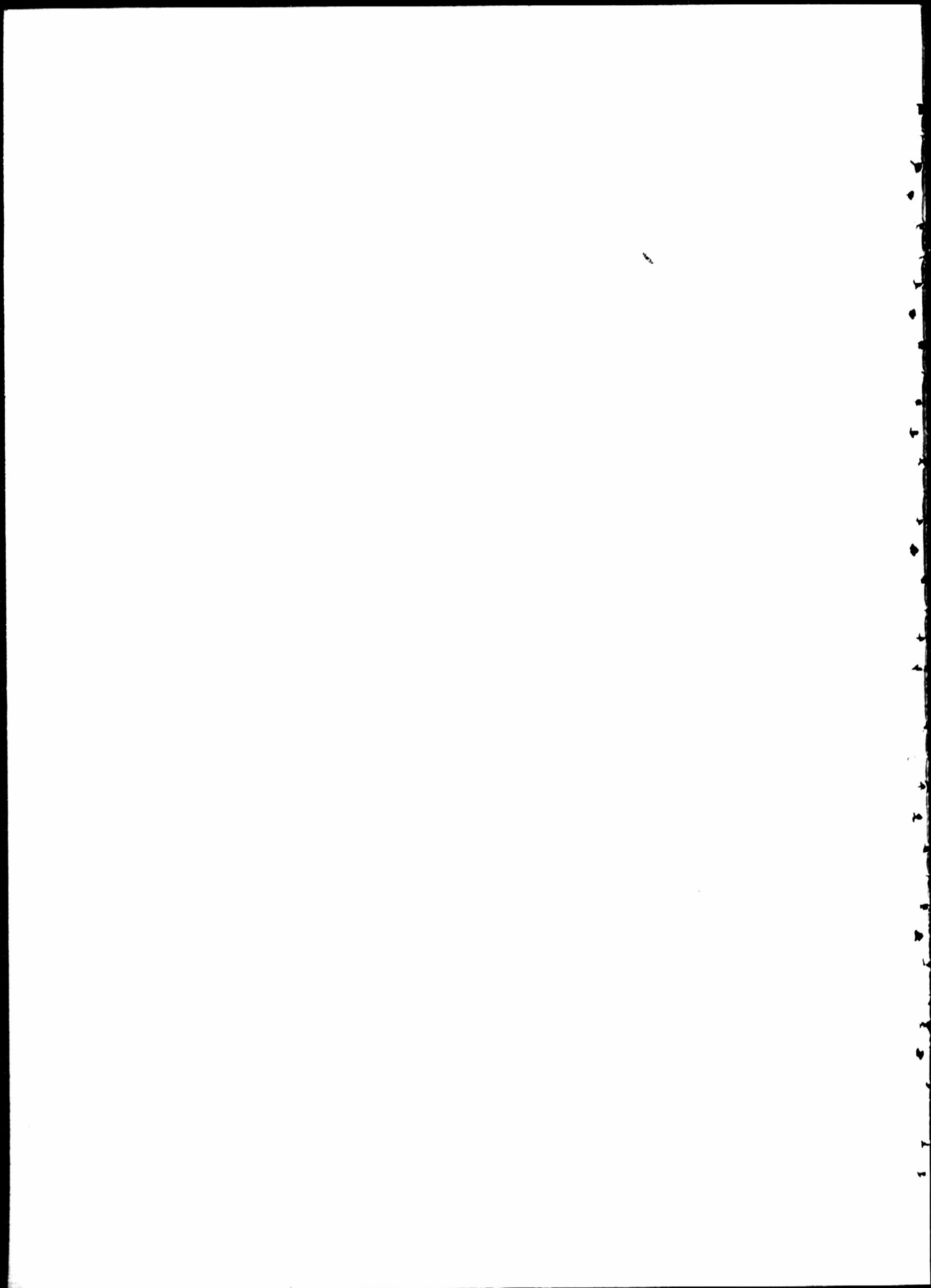
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~~FOR BINDING~~

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 18,059

JOSEPH R. HYDE,

Appellant ,

v.

WALTER N. TOBRINER, et al. ,

Appellees.

United States Court of Appeals
for the District of Columbia Circuit

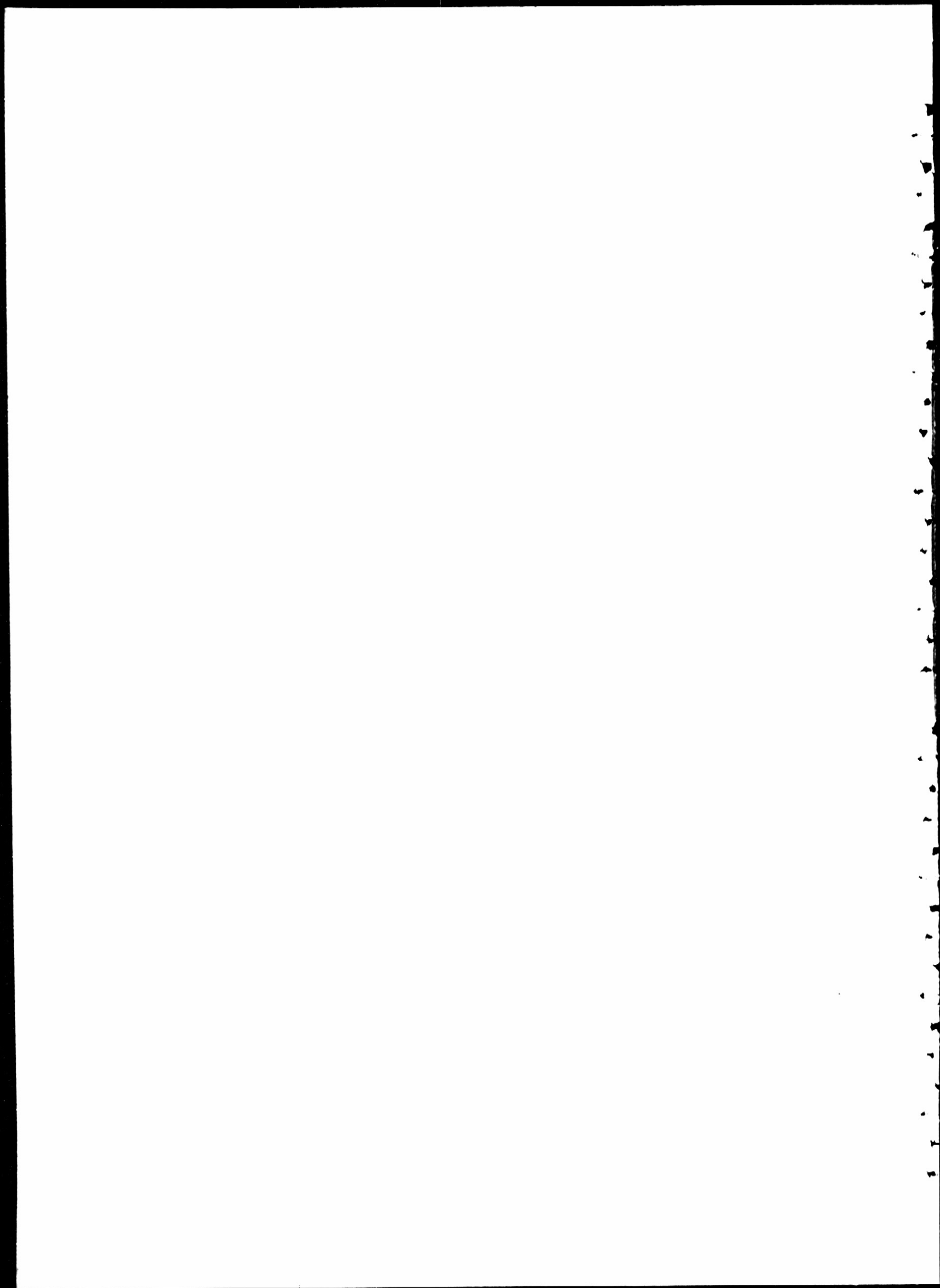
FILED MAR 13 1964

Nathan J. Paulson
CLERK

PETITION FOR REHEARING IN BANC

Appellees respectfully petition the Court, pursuant to Rule 26 of the Rules of this Court, for a rehearing in the above-entitled cause by the entire Court sitting in banc. The reasons therefor are as follows:

1. A division of the Court, by reweighing the evidence and failing to support administrative action based upon substantial evidence, has departed from the established rule of law governing the review of final orders of administrative agencies.



2. Although the division of the Court did not specifically so hold, the effect of the decision is to require, contrary to the plain terms of the statute, retirement at the higher disability rate when a non-service connected disability is aggravated by official duty.

3. A division of the Court has erroneously interpreted Public Law 87-857, which is the October 23, 1962, amendment to the Policemen and Firemen's Retirement and Disability Act.

PRELIMINARY STATEMENT

Following a hearing before the Police and Firemen's Retirement and Relief Board, the appellant was retired under Section 4-526, D. C. Code, 1961, for disability resulting from a disease contracted other than in the performance of duty (J. A. 36). The Commissioners of the District of Columbia, after a hearing, sustained the action of the Retirement Board (J. A. 57). In a complaint filed in the District Court, the appellant sought a mandatory injunction requiring the appellees to retire him under Section 4-527, D. C. Code, 1961, for disability resulting from a disease contracted in the performance of duty ¹ (J. A. 1). Upon consideration of cross

¹ Retirement under Section 4-526 results in an annuity of not less than 40 per centum of the basic salary, whereas retirement under Section 4-527 results in an annuity of not less than 66 2/3 per centum of the basic salary.

motions for summary judgment, together with attached exhibits which included the entire administrative record before both the Retirement Board and the Commissioners, the District Court granted the appellees summary judgment and denied summary judgment to the appellant (J. A. 62).

The appellant appealed from the denial of his motion for summary judgment (J. A. 62). Subsequent to oral argument, but while the case was still pending before this Court, the Congress enacted and the President, on October 23, 1962, approved Public Law 87-857, which was a liberalizing amendment to the Policemen and Firemen's Retirement and Disability Act (J. A. 68). The Court, on November 2, 1962, reversed the judgment of the District Court, and remanded the case to that court with directions to remand the case to the Commissioners for reconsideration in the light of the new amendment to the Act (J. A. 67). Upon remand, the Commissioners reaffirmed their previous order (J. A. 73-74).

Subsequently, the District Court, upon consideration of renewed motions for summary judgment, again entered judgment for the appellees (J. A. 93). On a second appeal to this Court, the same division of the Court, on February 27, 1964, one judge dissenting, reversed the order of the District Court concluding

" * * * that the Commissioners erred in finding that the disabling arthritis which led to the retirement was not incurred in the performance of duty, that is, was not a disease contracted in the performance of duty. * * *"

The Administrative Proceedings

The appellant became a member of the Metropolitan Police Department on June 16, 1943 (J. A. 25). On October 13, 1959, the Board of Police and Fire Surgeons recommended that he appear before the Retirement Board for consideration of disability retirement (J. A. 28). The recommendation stated that appellant was disabled as a result of "[g]outy and mixed hypertrophic arthritis hip, knee, ankle" (J. A. 28). At the hearing before the Retirement Board on November 5, 1959, a letter from a member of the Board of Surgeons addressed to the Board of Surgeons was read into the record. The concluding paragraph of the letter provides "[i]t is my professional opinion that this officer's arthritis is caused by or aggravated [sic] by his duties in the Metropolitan Police Department" (J. A. 12, 14).

The appellant testified that he had suffered for the past eight or nine years from the condition which led to his disability (J. A. 15). He attributed his disability to injuries received while assigned to

motorcycle duty, but he was unable to recall any specific instances of injuries (J. A. 15, 16). In this regard he said: " * * * The only thing I can figure, by being on the right side, it [his disability] could have been from cranking the motorcycle. * * *" (J. A. 15.)

Appellant's personnel record disclosed that the only injury received in the performance of duty occurred on May 7, 1953. This injury consisted of a sprained right knee and was described as being "not serious" (J. A. 11).

Reports of Dr. Eugene J. McDonald and Dr. Darrell C. Crain were also read into the record. Dr. McDonald's report showed that X-rays, recently taken of appellant's right hip and right knee, disclosed no evidence of damage to the hip and knee (J. A. 31, 32).

Dr. Crain, a specialist to whom appellant had been referred, diagnosed appellant's condition as " * * * first, gout which is now going into a chronic state and second, some early osteoarthritis incident to his age. * * *" Dr. Crain was of the opinion that appellant had gout of ten years duration, with increasing difficulty, indicating a beginning state of chronic gouty arthritis (J. A. 32, 34).

On May 12, 1960, the Commissioners, relying upon the recommendation of the Board of Surgeons, approved excessive sick

leave for appellant (J. A. 13). The leave was routinely approved on the basis of the statement that appellant's sickness which, at the time, was described as "phlebitis rt. leg" and "gouty arthritis," was a direct consequence of injury received in the performance of duty (J. A. 13).

ARGUMENT

I

There being substantial evidence in the administrative record to support the action of the appellees, a division of this Court erred in substituting its judgment for theirs.

The Retirement Board, subject to review by the Commissioners, is charged with the responsibility of determining whether a disability, necessitating the retirement of a policeman or fireman, was or was not incurred in the performance of duty. Since the Board conducted a hearing, and, on the basis of substantial evidence, made a determination that appellant's disability was incurred other than in the performance of duty, a division of this Court erred in substituting its judgment for theirs. See Selden et al. v. Capitol Hill Southeast Citizens Association et al., 95 U. S. App. D. C. 62, 219 F. 2d 33, cert. den. 349 U. S. 944.

The fact that a court, upon a consideration of the same facts, might have reached a different conclusion does not alter the basic principle that the determination of an administrative body, based upon substantial evidence, must be sustained by the courts. As the Supreme Court said in Gray, Director of the Bituminous Coal Division of the Department of the Interior et al. v. Powell et al., 314 U. S. 402:

"Where, as here, a determination has been left to an administrative body, this delegation will be respected and the administrative conclusion left untouched. * * * It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action." (p. 412.)

Therefore, in reviewing the record in this case, a division of this Court should not have been concerned with the question whether the facts would support a finding that appellant's disability resulted from a disease contracted in the performance of duty, but, instead, only whether there was a rational basis for the finding that appellant's disability resulted from a disease contracted other than in the performance of duty. Cooper v. Retirement Board, etc., 131 Calif. App. Rep. 2d 804, 281 P. 2d 349; Rochester Telephone Corp. v. United States et al., 307 U. S. 125. Indeed, in

Rochester Telephone Corp. the Supreme Court went so far as to say that if the administrative record is found to support the conclusion of the administrative body " * * * a court travels beyond its province to express concurrence therewith as an original question. * * *"

The strongest and most persuasive evidence in the record was that of an independent specialist, Dr. Darrell C. Crain. His report, in effect, was that, although the appellant thinks his gout and arthritis resulted from cranking a motorcycle, it did not at all, but that the condition was "incident to his age" (J. A. 32, 34). Furthermore, although the division of the Court which decided the case makes reference to an injury received in line of duty on May 7, 1953, this "not serious" injury occurred, according to Dr. Crain, some three years after the appellant had contracted the disease. Obviously, therefore, that injury could not have been a contributing cause of the disease.

The Retirement Board, one member of which is a medical doctor who voted with the majority, was not required to accept the statement of a member of the Board of Surgeons that the appellant's " * * * arthritis is caused by or aggravated [sic] by his duties in the Metropolitan Police Department." (J. A. 12, 14.) This statement,

paraphrased, is merely that, in that doctor's opinion, appellant's arthritis was contracted in the performance of police duties, or, in the alternative, that it was contracted in some other manner and thereafter aggravated by police duties. If the latter be a fact, the appellant, under the law as it existed at the time of his retirement, would not be entitled to the higher disability rate. Because of the ambiguity in the letter, instead of supporting appellant's contention, it raised considerable doubt as to whether he was entitled to the higher rate.

The division of the Court makes reference to the fact that the appellant, with the approval of the Commissioners, received excessive sick leave with pay while he was suffering from arthritis which the Board of Surgeons, at the time, reported was caused by police duties. From the opinion, it is not clear what weight the division of the Court attached to this. Such a fact should have no bearing whatsoever upon the outcome of this proceeding. Excessive sick leave is approved by the Commissioners as a matter of course upon the recommendation of the Board of Surgeons. If such routine approval granted to permit continued treatment of a condition is to be binding in a subsequent retirement case, wherein all the facts surrounding the causation of the illness or injury are

for the first time carefully investigated and evaluated, immediate medical attention may very well be delayed pending thorough investigation by the Commissioners of the circumstances of the illness or injury.

II

A division of the Court has erroneously stated
the effect of the October 23, 1962, amend-
ment to the Retirement Act.

The October 23, 1962, amendment to the Policemen and Firemen's Retirement and Disability Act (Public Law 87-857) provides, in pertinent part, as follows:

"(2) In any case in which the proximate cause of an injury incurred or disease contracted by a member is doubtful, or is shown to be other than the performance of duty, and such injury or disease is shown to have been aggravated by the performance of duty to such an extent that the member is permanently disabled for the performance of duty, such disability shall be construed to have been incurred in the performance of duty. * * *" (Section 4-527 (2), D. C. Code, 1961, Supp. II)

In its opinion, the majority of the division says that this amendment " * * * provides that where the proximate cause of the disabling injury or disease is doubtful it shall be construed to have been incurred in the performance of duty. * * *" This statement

of the effect of the amendment is not entirely accurate. The amendment provides that, where the proximate cause of the injury or disease is doubtful or is shown to be other than in the performance of duty, such injury or disease, if permanently disabling, shall be construed to have been incurred in the performance of duty only if such injury or disease is shown to have been aggravated by the performance of duty. This distinction is very real and very important. Perhaps the majority of the division did not intend its statement to be an all-inclusive synopsis of the law. On the other hand, it may have misconstrued the amendment thereby leading to an incorrect result.

In any event, the statement of the majority of the division of the Court is not accurate, and, in the intervening short period of time, has caused considerable confusion among members of the bar. It has, for example, been cited to the Commissioners and to the District Court as this Court's construction of Public Law 87-857, supra. Unless the opinion is amended, confusion will undoubtedly continue, resulting in increased litigation.

CONCLUSION

In view of the foregoing, it is respectfully submitted that this case should be reviewed by the entire membership of the Court sitting in banc.

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CERTIFICATE OF COUNSEL

I, Chester H. Gray, Corporation Counsel, D. C., attorney for the appellees, do hereby certify that the foregoing petition for rehearing in banc is presented in good faith and not for delay.

CHESTER H. GRAY,
Corporation Counsel, D. C.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Rehearing In Banc was mailed, postage prepaid, this 13th day of March, 1964, to Messrs. Bernard Margolius and Carleton U. Edwards, II, Attorneys at Law, 1000 Vermont Avenue, Northwest, Washington, D. C., Attorneys for Appellant.

JOHN R. HESS,
Assistant Corporation
Counsel, D. C.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,059

United States Court of Appeals
for the District of Columbia Circuit

FILED MAR 23 1964

JOSEPH R. HYDE,

Nathan J. Paulson
CLERK *Appellant,*

v.

WALTER N. TOBRINER, et al.,

Appellees.

OPPOSITION TO PETITION FOR REHEARING IN BANC

PRELIMINARY STATEMENT

The pertinent facts are set forth in Brief for Appellant on original appeal (No. 16,754), pp. 2-8 and Brief for Appellant and Joint Appendix in this case (No. 18,059), pp. 3-5.

The Joint Appendix, pp. 1-62 appears in Joint Appendix in No. 16,754, and pp. 63-94 are in the back of Appellant's Brief in this case (No. 18,059). Appellant urges that this is not the type of case of widespread general importance to warrant a rehearing before the entire Court.

POINT I

The Dissenting Opinion is in error with regard to the existence of "substantial evidence" to support the Commissioner's findings, in the implicit finding that appellant's arthritis pre-existed police duty, in the status of Police Surgeon Dr. O'Keeffe, and in assuming a decision by the "full" Retirement Board, which was in fact a split 4-1 decision.

**There Is No Substantial Evidence
To Support Commissioner's Finding**

The legal principle asserted at the outset of the dissenting opinion requiring affirmance where there is "substantial evidence" to support the administrative finding is, of course, correct. However, the dissent is in error in concluding that there is in fact "substantial evidence" in the record, as is shown below and in points II, and III, hereinafter. The majority opinion, while not expressly so stating, applied the principle mentioned above, and found that there was not sufficient evidence to support the finding that appellant's disability was not incurred in line of duty, and did not merely "re-weigh" the evidence as contended Appellees' Petition, p. 1, when it was stated (on p. 3 of the slipsheet opinion)

"We conclude that the Commissioners erred in finding that the disabling arthritis which led to the retirement was not incurred in the performance of duty, that is, was not a disease contracted in the performance of duty."

**Appellant's Arthritis Did Not Pre-exist
His Police Appointment**

The dissenting opinion also seems to imply that the "pre-existing condition . . . of gouty arthritis" pre-existed appellant's "police tenure." If this interpretation of the dissenting opinion is correct, then it is submitted that there is absolutely nothing in the record to support this, and in this regard see below.

The dissent seems to place great weight on a quoted portion from

appellant's testimony before the Retirement Board, which occurred on November 5, 1959 (J.A. 15), where, in a somewhat informal hearing, appellant was not represented by counsel. Part of this quotation is, "I've had this for about eight or nine years and it seems to be growing worse . . ." This statement would date back to about November, 1950, using the nine year period mentioned. Thus prior to November, 1950, the following had occurred to appellant with relation to his duty on the Police Department; which was ample for the causation of the arthritis after his appointment, and before November, 1950.

A. He had been physically examined by the Board of Police Surgeons April 27, 1943, and found qualified for appointment, with no apparent physical defects and no arthritis mentioned (J.A. 8).

B. He had been appointed to the Police Department in June, 1943 (J.A. 25).

C. He had been " . . . assigned to duty mounted on motorcycle . . . " as of April 25, 1945 (J.A. 25), in which duty he continued until retirement (J.A. 17).

D. He had been on "10-9-50" "Injured while on duty patrolling by motorcycle was hit by a skidding truck. Treated as Casualty Hospital for abrasions and contusions to left elbow, left arm and right shoulder. Reported to Clinic. Dr. J. B. Harrell." (J.A. 26). At that time he went on 13 days sick leave (J.A. 9).

E. He had reported sick as follows (J.A. 9):

Name HYDE, JOSEPH R. Date Appointed 6/16/43

DATE REPORTED SICK	* * *	DATE RETURNED TO DUTY	CLINIC VISITS	* * *	TOTAL DAYS ABSENT	TREATED FOR —	DOCTOR
1/8/47	*	2/10/47	11	*	29	Oblique frac. 4th metacarpel	Dr. Sager

2-15-48	2-18-48	1	3	Cont. rt. Knee involving articular " O'Keeffe surface
2-22-48	3-8-48	4	13	Cont. l. Knee " Sager
3-15-49	3-23-49	3	7	Sprain left Knee " Dean
9-26-50	10-4-50	3	7	Arthritis, Gouty L. Metatarsal " O'Keeffe
10-9-50	10-24-50	4	13	Cont. l. shoulder " Harrell & left arm
11-1-50	11-7-50	2	5	Arthritis rt. Knee O'Keeffe

(There are numerous other entries subsequent to November, 1950, as shown at J.A. 9, including the accident of May 7, 1953, which was mentioned in the Majority Opinion, some of which are mentioned under Point III, below.)

F. Also on the basis of the record, it should be assumed that appellant had cranked his motorcycle 30 or 40 times per tour of duty prior to November, 1950 (and subsequent thereto also) (J.A. 20).

**Dissent in Error on Dr. O'Keeffe's Status,
and on Finding of "Full Board"**

The dissenting opinion is also in error where it is stated, "I cannot treat the casual comments of the medical member of the Retirement Board as sufficient to reject the findings and determination of the Full Board" (emphasis supplied). The "medical member of the Retirement Board" apparently referred to was Dr. O'Keeffe, who is not a member of the "Retirement Board," but a member of the Board of Police Surgeons (J.A. 12). Furthermore, the reference to the "Findings and Determination of the Full Board," are in error, because the Retirement Board rendered a split (4-1) decision (J.A. 36-37, 60).

This Case Should Not Be Compared to Jury Case

It is suggested that this case (a retirement case) should not be compared to a jury case, as the dissent does, because it is a distinctly different type of case. Juries are not available in retirement and compensation cases generally, and the liberality in this field generally is reflected in the prior opinions and decisions of this Court, and others, as well as by the text writers, as reflected in Appellant's Brief (in #18,059), pp. 9-13, and in Crawford v. McLaughlin, 109 U.S. App. D.C. 204, 286 F. 2d 821 (1960), cited in the majority opinion.

POINT II

**There Is No "Substantial Evidence" To Support
the Commissioners' Finding, as
Claimed by the Appellees**

The appellees continue to harp upon the existence of "substantial evidence" in the record which they contend supports the Commissioners' finding against appellant. The dissent followed this argument but where is this "substantial evidence"? The answer is that it doesn't exist. Merely asserting the conclusion that it is present doesn't make it so. Practically the only evidence which in any way supports the appellees, and almost the only thing they rely upon is the Dr. Crain report, about which the following should be pointed out:

A. There is no showing that he had knowledge of appellant's injuries of October 9, 1950 (J.A. 26), or of May 7, 1953 (J.A. 11), or the various other injuries shown at J.A. 9, nor that he had seen appellant's medical file.

B. He didn't even discuss causal connection between appellant's police duties and his condition, and there is no indication that he was requested to do so.

C. Dr. Crain only saw appellant briefly in June, 1959, while Dr.

O'Keeffe had seen him over a period of many years (J.A. 9), and had had him under his care for approximately two years prior to October, 1959 (J.A. 11). In addition, the Board of Surgeons had had appellant under their care for many years (J.A. 9), both before and after Dr. Crain.

D. Dr. Crain's report was dated June 26, 1959, and Dr. O'Keeffe and the Board of Surgeons apparently had this available for approximately four months prior to Dr. O'Keeffe's report of October 12, 1959 (J.A. 12), and the Board's recommendation for disability retirement (J.A. 28) on October 13, 1959.

E. The Majority in footnote 1 to the Opinion considered Dr. Crain's report in stating: "The statement of one doctor in 1959 in a letter to another, appearing in the record, that appellant was suffering from 'early osteoarthritis incident to his age' does not countervail the evidence that appellant's disease was incurred in the performance of duty."

What other evidence do they point to in this regard? The answer is none! They merely argue that he cannot point to any specific accident as the cause of his condition (Brief for Appellees No. 18,059, p. 27).

Appellees erroneously state in their Petition for Rehearing, p. 5, "Appellant's personnel record disclosed that the only injury received in the performance of duty occurred on May 7, 1953," and they attempt to minimize it by reference that it was "not serious." Have Appellees overlooked the following entry in the record? (J.A. 26) (also referred to above under Point I):

"10-9-50 . . . Injured while on duty patrolling by motorcycle was hit by a skidding truck. Treated at Casualty Hospital for abrasions and contusions to left elbow, left arm and right shoulder. Reported to Clinic. Dr. J. B. Harrell."

(Which resulted in 13 days sick leave — J.A. 9.)

It should be recalled that appellant appeared at the Retirement Board without counsel. It is widely known that riding a motorcycle is a

hazardous job. There are many minor trauma, etc., which occur, and most motorcycle officers don't rush to the Police Clinic in such instances but regard some of them as part of the job. In this regard the views of Dr. John A. Reed, former Chairman of the Board of Police Surgeons stated regarding association of arthritis with police duty in part as follows (J.A. 21-22):

(Excerpt from letter of Dr. John A. Reed in the case of the disability retirement of Det. Sgt. Philip W. Birch, U.S. Park Police - re: association of arthritis with police duty.)

" * * * In view of the fact that there has been considerable doubt on the part of the Retirement and Relief Board as to the causal relationship of arthritis and the performance of duty, I reviewed the medical literature on the subject. Recently, I have reviewed a new book entitled 'Trauma and Disease' edited by Allen R. Moritz, M.D., Professor of Pathology and Director of the Institute of Pathology, Western Reserve University, and David S. Helberg, J.D., Research Fellow, Institute of Pathology, Western Reserve University. I feel that the data submitted in this book is of sufficient weight to allay any impression that arthritis cannot be caused by occupation. Many references are given at the end of this chapter (#8) to substantiate that arthritis is the result of the performance of duty. There are many references to trauma, etc., which indicate that occupation of certain types may cause arthritis. Furthermore, they state, 'this form (traumatic arthritis) is due to repeated minor trauma or "minute forces applied internally or externally, so that no lesion, such as hemorrhage, exudation, destruction of cells or necrosis, is immediately evident."' Further they state that the condition 'can be premature or exaggerated in certain occupations, for instance in soldiers, policemen, etc.' They also state, 'the second etiological factor not sufficiently stressed as a causal agent in this disease (arthritis) is, we must not forget, the strain associated with certain unavoidable conditions of working life, such as the emotional disturbances brought about by anxiety over finances, by the fear of losing one's job, by the paranoid resentment concern-

ing superiors or the frustration of seeing working companions advance and progress more rapidly.' The authors including Steinbrocker, Hensch and Comroe feel that exertion, trauma even of a very mild type are precipitating factors. The authors further recognize that the problem is 'far from being clear cut and its discouraging difficulty arises mostly from the fact that, in the individual case, it is very hard if not impossible to prove the direct relation between cause and effect.' 'Many authors are of the opinion,' the editors state, 'that all these morbid entities are notably influenced by trauma.' The authors further state, 'it is, for instance, a well known fact that arthritis shows an especially high incidence in groups carrying a high percentage of injuries.'

"I am submitting this long detailed reference in view of the fact that it is my opinion, and to substantiate my opinion, that arthritis occurring in our policemen and firemen is undoubtedly a result of the performance of duty or aggravated by the performance of duty due to, not necessarily evident reportable trauma, but also due to repeated minor trauma. I have taken this stand over a period of many years and I feel that it can be justified by medical literature. Many references are available in addition to those cited. * * *"
(Emphasis supplied.)

In arguing the principle regarding the effect of the existence of "substantial evidence" in their brief in this case (Brief for Appellees, No. 18,059, p. 25), they correctly state the principle but the cases cited are not factually in point. Thus, in Cooper v. Retirement Board, etc., 131 Calif. App. Rep. 2d 804, 281 P. 2d 349, it is shown at 281 P. 2d 351 that an internist testified on behalf of the Board that the policeman's death was not connected with duty, and apparently there was no affirmative medical evidence of consequence that such was the fact.

Furthermore, the case of Rudinger v. Long, __ Mo. App. __, 283 S.W. 2d 889 (Brief for Appellees, No. 18,059, p. 29) is not in point, for as shown at 283 S.W. 2d 892, three medical board physicians (such as Dr. O'Keeffe in this case) testified that claimant's injuries had no effect on his condition.

Thus, appellee's protestations of "substantial evidence" are unsupported. In this regard also see Point III below as to the evidence which supports the Majority Opinion.

POINT III

There Is Overwhelming Evidence in the Record Supporting the Majority Opinion that "the Commissioners Erred in Finding That the Disabling Arthritis, Which Led to the Retirement Was Not Incurred in the Performance of Duty, That Is, Was Not a Disease Contracted in the Performance of Duty."

The facts supporting the majority opinion are set forth in the Statement of the Case (Appellant's original brief in No. 16,754), pp. 2-8. Some of the more pertinent events occurring prior to November, 1950, are set forth above as Point I, A-~~E~~ F.

Additional facts supporting the Majority Opinion and Appellant's contentions, some of which were specifically cited by the majority, are (continuing the lettering from Point I, ~~E~~, above):

F. Appellant sustained no "outside injuries" (other than in his police work (J.A. 16, bottom; 17, top; 20, bottom; 21, top)).

G. Appellant was hospitalized for his condition at Providence Hospital May 27 - June 5, 1959 (J.A. 42).

H. Appellant had his right knee x-rayed at Providence Hospital on June 2, 1959, at which time there was shown to be "slight irregularity which could be due to an old injury" (note Point F, above, re no "outside injuries"). Although there were no "arthritic changes" shown by the x-ray, this did not mean that he did not have arthritis because the physicians agreed he had arthritis.

I. An important document dated July 7, 1959, and referred to in the majority opinion is the certificate of the Board of Surgeons authorizing

outside medical care (and ultimately payment by the Commissioners), which could not have been done unless the condition in question had been incurred in line of duty. This authorized "x-ray . . . and/or other services," probably referring to Dr. Crain's and the Providence Hospitalization, among others, during May-June, 1959. It is set forth in full as follows (J.A. 61):

"PERSONNEL PAPERS

July 7, 1959

CASE NO. 17.4280/A

"TREATMENT OF INJURY OR DISEASE INCURRED IN THE PERFORMANCE OF DUTY:

"The Board of Police and Fire Surgeons hereby certifies that the (disease) (injury) of Pvt. Joseph R. Hyde, T.D., a member of the Metropolitan Police Department was incurred in the performance of duty, and that the following information is correct:

"1. Nature of injury or disease: ARTHRITIS.

"2. Cause of injury or disease (where, when and how, including relationship to performance of duty): Police officers are generally susceptible to this illness, due to exposure to dampness and cold and the strenuous nature of their duties.

"3. Description of outside treatment or service that is required: X-ray lumbar spine, right hip, right knee and/or other services.

"The Board is unable to treat this case because necessary facility is not available at the Clinic. (Emphasis supplied.)

"Members, Board of Police &
Fire Surgeons."

J. The Board of Surgeons on October 13, 1959, recommended that appellant appear before the Retirement Board for consideration for disability retirement for "gouty arthritis, hip, knee and ankle" (J.A. 28).

K. Appellees, on May 10, 1960, authorized 152 days of excess sick leave for gouty arthritis (J.A. 13).

Appellees, in their briefs and Petition for Rehearing (p. 9) attempt to explain away this excess sick leave action as a "matter of course," etc. But the payment for "outside medical care" and the granting of excess sick leave as here, under the D. C. Code, and Police Regulations (Appellant's Original Brief in 16,754, p. 11), make this improper unless the condition or injury in question is incurred in line of duty. The appellees must concede that they have disregarded the law to assert the position they assert in this case.

Thus D. C. Code, Title 4-525, reads as follows (on outside services):

"Medical and hospital service - Payment of by District on certificate of Commissioners. Whenever any member shall become temporarily disabled by injury received or disease contracted in the performance of duty, to such an extent as to require medical or surgical services, other than such as can be rendered by the Commissioners, or to require hospital treatment, the expense of such medical or surgical services, or hospital treatment, shall be paid by the District of Columbia; but no such expense shall be paid except upon a certificate of the Commissioners setting forth the necessity for such services or treatment and the nature of the injury or disease which rendered the same necessary."

The dissenting opinion sought to compare this case with a jury case. If that be done, what a strong admission against interest the appellees' actions mentioned above would be, and they are likewise such even though this is a retirement case, and not a jury action. Such action has been the basis in part of other opinions in retirement cases.

The case of Graham v. Tobriner, et al., Civil Action No. 1291-62 in the District Court is pertinent to the present injury and a copy of the memorandum opinion of Judge Tamm, dated June 28, 1962 is attached to the affidavit of Bernard Margolius (J.A. 77). In that case, the plaintiff, a motor-

cycle policeman, was retired for gout found by the Retirement Board and Commissioners not to have been incurred in the line of duty. Judge Tamm reversed the Commissioners, stating in part:

"The Court is of the opinion that the entire record in this case overwhelmingly favors the position of the plaintiff. In addition to the medical testimony, the records of the Police Department and Police Department Clinic disclose the plaintiff's ailment was consistently recognized as having been incurred in the line of duty. In spite of the testimony of Dr. Darrell C. Crain that gout is 'believed to be a hereditary metabolic disease' there is nothing in the record to indicate that plaintiff's affliction was not the result of the trauma resulting from the constant cranking of his motorcycle. Therefore, the action of the defendant sustaining the decision of the Police and Firemen's Retirement Relief Board is arbitrary and unsupported by the evidence before the Board and before the defendants. In evaluating the evidence comprising the record in this case, the Court is required by the Court of Appeals decision in the case of Crawford v. McLaughlin, et al., 109 U.S. App. D.C. 264 to consider this evidence in the light of the 'humane purpose of such retirement laws'" (emphasis supplied).

Thus the effect of the Graham case was to hold that the employment and not the predisposing physical condition or disease was the immediate cause of the disabling condition and consequently the officer was entitled to retirement for disability incurred in the performance of duty.

It is therefore submitted that all the evidence, and in particular that mentioned above, was overwhelmingly in favor of appellant, and the majority opinion is correct.

POINT IV

Appellees' Contention That the Majority Erroneously Stated the Effect of the October 23, 1962 Amendment to the Retirement Act, Misinterprets the Decision, and Has No Bearing on This Decision Anyhow.

Appellees urge in their Petition (Point II, p. 10) that the majority misinterprets Public Law 87-857. However, appellees' answer their contention on p. 11 of their petition in saying, "Perhaps the majority . . . did not intend its statement to be an all-inclusive synopsis of the law," because the statute itself is quite clear, and the majority decision should not cause confusion as alleged by the appellees when read in connection with the amendment. In any event, this wording should have no bearing on this case, as the majority decided it on the basis of the law prior to the amendment.

POINT V

The Majority Could Have Decided the Case Under the Amendment as It Is a Procedural Change Providing an Additional Method of Proving Disability in the Line of Duty, Which Should Be Immediately Applicable to Existing Cases of Action and Not Merely to Those Cases Which May Accrue in the Future.

The amendment to Title 4-527 (P.L. 87-857) is a procedural or remedial law providing an additional method of proving disability in the line of duty, and is therefore applicable to pending cases, including the instant case. Thus, there are still only two sections and two means of disability retirement, namely 4-526 (disability not in the line of duty) and 4-527 (disability in the line of duty).

The amendment (P.L. 87-857) to 4-527, speaks of "proximate cause," "is shown," "disability shall be construed," etc. Thus it speaks in terms of procedure and means of proof.

Dargel v. Henderson, 200 F. 2d 564, and other cases cited in 46 Fed.

Proc. Digest, Statutes, key 267(2) entitled "Application to Pending Actions," hold in substance that changes in procedural or remedial law are generally to be regarded as immediately applicable to existing causes of action and not merely to those which may accrue in the future.

Thus, it is suggested that this case could have been decided on the basis of an aggravation under the amendment, in addition to the method chosen by the majority.

CONCLUSION

There was no "substantial evidence" to support the administrative finding, while there was overwhelming evidence to support the majority opinion. This is not a case of great policy making stature, but merely a decision of the particular case on the particular facts, construing a retirement statute to give consideration to the humane purpose of such laws, and the Petition for Rehearing should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing "Opposition to Petition for Rehearing in Banc" was mailed, postage prepaid, this 23rd day of March, 1964, to Chester H. Gray, Corporation Counsel, D. C., District Building, Washington, D. C. 20004.

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